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# A VIEW

OF

# THE LAW

OF

# ROADS, HIGHWAYS, BRIDGES AND FERRIES

IN

# PENNSYLVANIA.

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BY

WILLIAM DUANE, ESQ.,

AUTHOR OF A VIEW OF THE RELATION OF LANDLORD AND TENANT IN PENNSYLVANIA.

PHILADELPHIA:
JAMES KAY, JUN. & BROTHER, 183½ MARKET STREET.
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ERRATUM.

Page 26, note 2, *for* Neild *read* Neeld.

# CHAPTER I.

## INTRODUCTORY.

Roads in Pennsylvania are of four kinds; *State Roads*, which are laid out and opened in pursuance of special Acts of Assembly; *County Roads*, which derive their existence from proceedings in the Courts of Quarter Sessions of the several counties, and are either public or private roads; *roads made by companies* incorporated by the Legislature, of which are most of the turnpikes and railroads in the state, and *Lateral Railroads* to the public works.

The word *road*, when used generally in our laws, is uniformly applied to *public* roads, unless the word *private* be prefixed, and it is synonymous with the word highway.[1]

The word *street* is in common parlance equivalent to *highway*. The proceedings were, therefore, confirmed in a case where the petition and the report of the viewers were for a street, a substantial compliance with the Act of Assembly being all that is required.[2]

In a highway the right of passage belongs to the public, but the title to the soil, stones, wood or grass thereon, continues in the owner of the land.[3]

A dedication of property as a highway need not

[1] By Justice Yeates in Commonwealth *v.* Arnold, 3 Yeates 421.

[2] Road from Fitzwater Street, 4 Sergeant & Rawle 106.

[3] Chambers *v.* Furry, 1 Yeates 167.

always be plenary: it may be partial, when the circumstances distinctly show it was so intended. A space left open in private property bordering on a highway for the accommodation, not of the public but the owner, is not thereby dedicated to public use, but may be resumed at pleasure.[4]

A grant from the commonwealth of vacant land bounded by a stream that has not been by law declared navigable, and following its courses and distances, passes the right to the soil to the middle of the stream, and although, subsequently to the grant, the stream may be declared a public highway, that does not divest the property previously acquired by a grant from the commonwealth.[5]

[4] Gowen *v.* The Philadelphia Exchange Company, 5 W. & S. 141.
[5] Coovert *v.* O'Conner, 8 Watts 470.

## CHAPTER II.

### OF STATE ROADS.

Each of these is laid out according to the directions of the Act of Assembly passed for the purpose. Acts are sometimes passed for the creation of state roads which are confined in their whole route to a single county. The propriety of such legislation may be questioned. It seems an encroachment upon the duties of the Courts of Quarter Sessions, who may be supposed, as well as the road viewers appointed under their authority, to be better judges of the wants of the county in the matter of roads, than the Legislature, and as the laws for state roads usually contain no provision for the payment of damages to the owners of the land taken for their erection, their enactment frequently operates as a hardship upon the property holders through whose lands they pass.

An Act was passed on the 18th of February, 1813, for the laying out of a state road from Jonestown to Wilkesbarré. The draft of so much of the road as passed through the County of Lebanon, was filed in the office of the Clerk of the Quarter Sessions of Dauphin county, from which County Lebanon county had been then lately erected. This was held to be regular, as it did not appear that there was any clerk's office in the county of Lebanon when the draft was filed, and it was further decided that the court of

Lebanon county had a right to open the road upon a certified copy.[1]

An authority to commissioners to lay out and make a state road, does not enable them to regulate its width. But such power is given by the authority "to open and keep in repair, in the same manner as other roads laid out by the authority of the courts in the counties aforesaid," as is enacted in the 4th section of the Act of February 18, 1813.[1]

The 20th and 21st sections of the Act of June 13, 1836, empower the Courts of Quarter Sessions to vacate state roads within their respective counties. The "manner aforesaid" is the manner in which county roads are to be vacated, and will be fully considered hereafter.

"Section 20. The said courts respectively shall have power in the manner aforesaid, to change or supply by a new road, the route of any state road which may be laid out by direction of any Act of Assembly, within their respective counties, and thereupon to vacate so much of such state road as shall be supplied: *provided*, that no change shall be allowed in any such road which shall make the same of a greater ascent or descent than five degrees from a horizontal line.

"Section 21. The said courts respectively shall also have power in the manner aforesaid, to inquire of and vacate any part of a state road within the respective county, which shall have been supplied and rendered useless by a substantial and permanent turnpike road, made and completed according to law;

[1] Road from Jonestown to Wilkesbarré, 1 S. & R. 487.

but no stockholder in such turnpike road shall in such case be a viewer or reviewer."

The provisions of the Act of April 23, 1825, resembled those just recited from the Act of June 13, 1836. It has been decided that the former Act did not give the Courts of Quarter Sessions power to vacate a state road absolutely, but that it expressly forbids such vacating unless where another route is supplied by the view or review;[2] and that under this Act and the Act of 1809, views and reviews might be granted to vacate and change the route of a state road before it has been opened.[2]

A canal company was bound to repair a bridge connecting two portions of a public road. That road having become a state road, it was held that the canal company was thereby released from any further charge in respect to the bridge.[3]

[2] In the matter of the State Road, 2 Penn. Rep. 289.

[3] Union Canal Co. *v.* Pinegrove Township, 6 W. & S. 560.

## CHAPTER III.

### OF THE PROCEEDINGS FOR OPENING COUNTY ROADS.

#### SECTION I.

##### OF THE PETITION FOR A ROAD.

The 1st section of the Act of June 13, 1836, provides that "the Court of Quarter Sessions of every county of the commonwealth, on being petitioned to grant a view for a road within the respective county, shall have power and are hereby required in open court to appoint, as often as may be needful, six persons qualified as hereinafter is provided, to view the ground proposed for such road, and make report of their proceedings to the respective court at the next term thereof: *provided*, that the provisions of this Act relative to the appointment of viewers to lay out roads and to assess damages, shall not extend to the City and County of Philadelphia, hereinafter specially provided for."

The following is a form of the petition to be presented to the court by the persons desiring the opening of a road, without which, according to the above provisions, it is not competent for the court to take any step towards the opening of a road.

"To the Honourable the Judges of the Court of

Quarter Sessions of the Peace in and for the County of ,

"The petition of the undersigned, inhabitants of the township [or townships] of in the said county, respectfully showeth:

"That your petitioners labour under great inconveniences for want of a road beginning at [here name the point at which it is desired that the road shall commence] and leading by the nearest and best route to [here name the point at which it is desired that the proposed road shall end.]

"Your petitioners therefore respectfully pray that your Honours will appoint proper persons to view and lay out the same according to law.

"And your petitioners will ever pray, &c."

It is not necessary to state in the petition whether it is a public or private road that is petitioned for.[1]

No general rule can be laid down as to the precision necessary in stating, in the petition, the points at which the road is to begin and end.[2]

A description in a petition that the road prayed for was to begin at a dwelling house which is known, and end at a public road named therein, was held to be sufficiently certain.[3]

In a case where the petition for a road was missing and there was no minute on the clerk's book of its presentation, or of the appointment of viewers, whereupon a new petition was prepared, and a certificate was signed by two of the associate judges during vacation, setting forth that at the preceding

[1] Spear's Road, 4 Binney 174.

[2] Kyle's Road, 4 Yeates 514.

[3] Road from Matthew Miller's house, 9 S. & R. 34.

term they had appointed H. J., &c., viewers; to which they added "and being informed that the petition was mislaid, we hereby authorize you to make out an order for the purpose," whereupon the clerk made out an order, and the viewers made their report, the Supreme Court quashed the proceedings.[4]

The Courts of Quarter Sessions have jurisdiction over the laying out of roads within the limits of a borough, unless it be excluded by the charter of incorporation.[5]

In the City and County of Philadelphia, the provisions of the 76th section of the Act of June 13, 1836, require that "all petitions for the laying out or widening [of] any street, road or alley, shall be presented to the Court of Quarter Sessions at least thirty days before the commencement of each term of said court."

## SECTION II.

### OF THE APPOINTMENT OF VIEWERS AND THE PERSONS QUALIFIED TO ACT AS SUCH.

The above recited 1st section of the Act of June 13, 1836, provides that throughout the state, with the exception of the City and County of Philadelphia, the Courts of Quarter Sessions, upon their being

[4] State Road from Howell's Mills, 6 Wharton 352.
[5] Case of the Newville Road, 8 Watts 172.

petitioned for a road within their respective counties, shall appoint six persons* as viewers.†

The judges of the Court of Quarter Sessions for the City and County of Philadelphia, upon the receipt of a petition for laying out or widening a street, road or alley duly presented, are authorized by the 76th section of the said Act to direct a venire to issue, directing the sheriff to return a panel of forty-eight freeholders to the next term to act as viewers in all cases of such applications, from which panel, on the day to which the said venire shall be returnable, the court shall direct six names to be drawn of viewers to act in each case, who shall be subject to all the provisions of this Act prescribing the duties of viewers of roads.

Section 77 provides that "so much of the several Acts of Assembly as prohibits any person residing or owning real estate within the City or County of Philadelphia respectively, from serving as a road or street viewer of the said city or county, be and the same is hereby repealed: *provided*, that no person shall serve as a road or street viewer, who has an interest in the property through or near which the same is to pass."

Section 78 directs that "the Commissioners of Philadelphia (county) shall provide and keep a wheel,

* The number in several counties is reduced to three, as hereafter mentioned.

† In Northampton county, viewers of roads and viewers of damages for roads, or a majority of them, are to "be selected from among the citizens of the respective townships or boroughs in which any road or roads *** are proposed to be made." Section 2 of an Act passed April 3, 1846, "concerning views of roads and road damages in Northampton county."

in addition to those now required by law, for the purpose of containing the names of road viewers to serve as hereinbefore provided, which shall be selected, and who shall be summoned as jurors are now by law selected and summoned in other cases, which said wheel shall be kept by the said commissioners, and the keys thereof shall be in the custody of the sheriff, who shall receive for summoning road jurors the same fees as he receives for selecting and summoning jurors in other cases."

Section 79 enacts that the "said forty-eight viewers so as aforesaid selected and summoned, shall not be required to attend personally on the day to which the venire shall be returnable, but it shall be the duty of the party petitioning, after the said six viewers shall be drawn as aforesaid, to give notice to them of the time and place of meeting, in such manner as the said court shall order and direct, and in case of any vacancy occurring after the said six names shall be drawn as aforesaid, it shall be lawful for a majority of the said viewers to fill the same."

The 51st section provides that "any discreet and reputable citizen, qualified to vote for members of the Legislature, may be appointed a viewer for any of the purposes mentioned in this Act, but except it be otherwise specially provided, the court appointing viewers shall select them, as far as practicable, from persons residing near the place to be viewed."

In two cases which will be hereafter referred to, it was held to be a fatal exception to the proceedings in a road case, that one of the petitioners for the road was appointed and acted as a reviewer. The appointment of a petitioner to act as viewer would seem equally objectionable.

Where an order to viewers was taken out of the clerk's office without the signature of that officer or the seal of the court to it, this was held to be a material defect, and not a mere informality, which would be amended by the court.[1]

The appointment of viewers is made in the following form:

"At a Court of Quarter Sessions of the Peace of the County of held at in and for the said county on the day of A. D. before and Judges of the said court:

"Upon the petition of divers inhabitants of the township [or townships] of in the said county, setting forth that they labour under great inconvenience for want of a road or highway beginning at [stating the point of beginning as in the petition] and leading by the nearest and best route to [stating the point of ending as in the petition] and therefore praying the court to appoint proper persons to view and lay out the same according to law: The court upon due consideration had of the premises, do order and appoint A. B., C. D., E. F., G. H., I. J. and K. L., who after being respectively sworn or affirmed to perform the duties of their appointment with fidelity, are to view the ground proposed for the said road, and if they or any five of them view the same, and any four of the actual viewers agree that there is occasion for such a road, they shall proceed to lay out the same, as agreeable to the desire of the petitioners as may be, having respect to the best ground for a road and the shortest distance, and in such a manner as to do the least injury to private property, and that

[1] Case of Bryson's Road, 2 Penn. Rep. 207.

they make report of their proceedings to the next Court of Quarter Sessions to be held for the said county, stating particularly whether they judge the same necessary for a public or a private road, together with a plot or draft thereof, and the courses and distances, and references to the improvements through which it may pass. In which report they shall state that they have been sworn or affirmed according to law.

[*Seal.*] "By the court.

Y. Z., *Clerk.*"

## SECTION III.

### OF THE VIEW.

Section 52 of the Act of June 13, 1836, provides that "no view which may be had for any of the purposes aforesaid, shall be good and valid unless five of the persons appointed for the purpose shall view the place in question, nor unless four of the actual viewers concur in the report."

Section 2 of the same Act provides that "the persons appointed as aforesaid shall view such ground, and if they agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance and the best ground for a road, and in such a manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners.

Section 53 of the same Act requires that "all viewers and reviewers appointed for any purpose mentioned in this Act, also all persons appointed to inspect any bridge as aforesaid, shall, before they proceed to the duties of their appointment respectively, make oath or affirmation to perform the same impartially and according to the best of their judgment, which oath or affirmation may be administered to them by any magistrate of the respective county, or by any one of their number."

Section 58 of the same Act directs that "in all cases of a view or review, or of any view subsequent to a review of a road, a surveyor shall be found and paid by the persons applying for such views."

It has been decided that no notice need be given to the owners of land of the time when the viewers will meet to lay out a road passing through it, but that the viewers ought in passing through improved ground, to call the persons living on the farm.[1]

The 1st section of an Act passed April 6, 1843, enacts that the viewers appointed to locate a public road in either of the Counties of Washington, Mercer and Fayette, shall not proceed to view and lay out the same until the persons interested in the road give public notice, by written or printed advertisements, of the time and place where the said viewers shall meet for the purpose of locating the road, at least ten days before such meeting. This provision is extended to the Counties of Greene and Clearfield, by section 16 of an Act passed May 7, 1844.

Section 2 of an Act passed February 24, 1845, directs viewers in the counties of Butler, Allegheny,

[1] 1 Road from App's Tavern, 17 S. & R. 388.

Luzerne, Lycoming and Clinton, to give public notice, by at least three advertisements put up in the vicinity of the contemplated route of the road, of the time and place of their meeting, at least five days before such meeting.

It has been lately decided that if a road be laid out over the lands of a minor, without notice to his guardian or some one interested for him, the report of the viewers will be set aside, though damages may have been assessed in his favour for the loss or injury sustained thereby.[2]

Viewers and reviewers are restricted to the space between the points specified in the order,[3] yet they may carry the road, to the point designated, partly over the bed of a road already laid out and opened.[4]

A public road cannot be located alongside of and adjoining another public road, so as to increase the width of both exceeding fifty feet.[5]

Section 26 of the Act in question provides as follows, for the case of roads laid out upon the boundary line of adjoining counties: "Roads upon and along a line which divides two adjoining counties, may be laid out, altered and vacated in the manner provided in the case of other roads, except that the Court of Quarter Sessions of each of the said counties shall appoint three of the viewers, and that a report as aforesaid shall be made to the said courts respec-

[2] Case of Neild's Road, 1 Barr 353.

[3] Road from the West Chester Road, &c., 2 Rawle 421. Hellertown Road, 5 W. & S. 202.

[4] Road from the West Chester Road, &c., 2 Rawle 421.

[5] Road from the Bridgewater & Wilkesbarré Turnpike, &c., 4 W. & S. 39.

tively, and that the said courts shall otherwise have and exercise concurrent jurisdiction therein."

Section 59 of the same Act provides as follows, for the compensation of viewers: "Viewers of public roads or highways, and of bridges, shall be entitled each to receive from the county treasurer one dollar for every day necessarily employed in that service, on producing a certificate from the Clerk of the Court of Quarter Sessions of the respective county, that such service has been performed by them."

Section 1 of "an Act concerning views of roads and road damages in Northampton county," passed April 3, 1846, directs that the expenses of all road views and the viewers of roads in that county, shall be paid by the petitioners.

## SECTION IV.

### THE REPORT OF THE VIEWERS.

The 3d section of the Act of June 13, 1836, provides that "the viewers as aforesaid shall make report at the next term of the said court, and in the said report shall state particularly, first, who of them were present at the view; second, whether they were severally sworn or affirmed; third, whether the road desired be necessary for a public or private road; they shall also annex and return to the court a plot or draft thereof, stating the courses and distances, and noting briefly the improvements through which it may pass; and whenever practicable, the viewers shall lay out the said roads at an elevation not ex-

ceeding five degrees, except at the crossing of ravines and streams, where, by moderate filling and bridging, the declination of the road may be preserved within that limit."

The directions of the Act of April 6, 1802, that the viewers shall proceed to lay out the road "as agreeable to the desire of the petitioners as may be, having respect to the best ground for a road, and the shortest distance, in such a manner as to do the least injury to private property," are substantially the same as those contained in the Act of June 13, 1836, which has supplied it. Under the first Act it was decided that it is not necessary that the report of the viewers should state that they had respect to the best ground for the road and the shortest distance, and that they had laid it out in such a manner as to do the least injury to private property.[1]

Viewers and reviewers must return both a plot or draft and the courses and distances.[2]

The Act of June 13, 1836, is very positive in requiring the improvements through which a road may pass, to be noted upon the draft which accompanies their report. The old law was much less explicit, and the decisions under it that the reference to the improvements need not appear in the report, but may be made on the draft annexed,[3] and that it need not be made on the draft, it being sufficient, if from the whole report, including the draft, the court receive information of the improvements,[4] are of no authority under the present law.

[1] Spear's Road, 4 Binney 174.
[2] Road from Warrior Run, 3 Binney 8.
[3] Schuylkill Falls' Road, 2 Binney 250.
[4] Road from John M'Cord's, 13 S. & R. 83.

If the viewers return the breadth of the road, it is only surplusage.[5]

One of the viewers having signed the report by a different surname from that by which, owing to a clerical mistake, he was named in the certificate of appointment, the court refused to quash the proceedings on this account. The Court of Quarter Sessions having confirmed the report, the Supreme Court held that they would presume that the Quarter Sessions were satisfied that the persons who signed it were those who were appointed viewers.[6]

It has been decided that it is not a sufficient reason for setting aside a road jury's report, that the jurors were entertained on the day of the view at the house of one of the petitioners, there being no evidence of any attempt to influence them.[7]

In the year 1835, upon a petition to widen a street between two certain termini, the viewers reported in favour of a width of fifty feet, which was confirmed by the Court of Quarter Sessions in the same year. In the year 1838, the court confirmed the report of a jury of view made in 1831, in favour of opening the street to the width of forty feet for a part of the distance between the same termini. Upon certiorari, the Supreme Court quashed the proceedings.[8]

It is a sufficient adjudication, that the road is a public one, if the viewers say they lay out the road for public use.[9]

[5] Road in Aston Township, 4 Yeates 372.

[6] Road from Fitzwater Street, 4 S. & R. 106.

[7] Road in Plymouth Township, 5 Rawle 150.

[8] Case of Noble Street, 5 Wharton 333.

[9] Road from App's Tavern, 17 S. & R. 388. Norriton and Whitpain Road, 4 Barr 337.

If the draft shows that the road passes through the lot of an individual, it need not state the precise distance it passes through it.[10]

The following are the usual forms of the returns or reports of the viewers:

1st. Where they report in favour of the road.

"To the Honourable the Judges within named:

"We the persons appointed by the within order of court, to view and lay out the road therein mentioned, do report that in pursuance of the said order we have viewed and laid out and do return for public [or private] use, the following road, namely: Beginning at [here name the starting point as in the petition and appointment, and describe the courses and distances of the road fully in words (not figures) to the point of termination], a plot or draft whereof is hereunto annexed. Witness our hands this day of in the year of our Lord ."

2dly Where they report against the road.

"To the Honourable the Judges within named:

"We the persons appointed by the within order of court to view and lay out the road therein mentioned, do report that we have viewed the place where the road within mentioned is requested, and are of opinion that there is no occasion to lay out the same. Witness our hands this day of in the year of our Lord ."

Section 16 of an Act passed May 7, 1844, "relative to roads and bridges in the Counties of Crawford, Clearfield and Greene," reduces the number of road and bridge viewers in Greene and Clearfield counties to three, one to be a surveyor if necessary, and no view is to be valid unless all the viewers personally

[10] Road from App's Tavern, 17 S. & R. 388.

examine the premises, and a majority concur in the report; their pay to be as now fixed by the laws of the commonwealth.

The following four sections of an Act passed on the 24th of February, 1845, "relative to public roads in certain counties therein named," reduce the number of road and bridge viewers to three in the Counties of Allegheny, Butler, Clinton, Luzerne and Lycoming, provide for notice of their meeting, and for releases of damages. These provisions were extended to the Counties of Juniata, Pike, Union, Wyoming and Wayne, by an Act passed April 3, 1846, to Susquehanna county by an Act passed April 8, 1846, and to Columbia county by an Act passed April 10, 1846.

"Section 1. Hereafter the number of road and bridge viewers appointed by the Courts of Quarter Sessions of the Counties of Butler, Allegheny, Luzerne, Lycoming and Clinton shall be three, one of whom shall be a surveyor, if deemed necessary; and every view and review shall be made by the whole number of persons so appointed, a majority of whom shall concur in their report in order to its confirmation by the court.

"Section 2. In all cases of the appointment of viewers in said counties, to view and locate a public or private road, or to review a public road, the said viewers or any one of them shall, before proceeding to make their view or review, give public notice by at least three advertisements put up in the vicinity of the contemplated route of said road, of the time and place where the said viewers will meet for the purpose of making such view or review, at least five days before such meeting.

"Section 3. If the viewers shall decide in favour of locating a public road, or to make any change in the location in the public road which they were appointed to review, it shall be the duty of the viewers to endeavour to procure from the persons through whose lands such location may be made, releases for all claims of damages that might arise from opening the same; and in every case where said viewers shall fail to procure such releases, and it shall appear to them that any damage will be sustained, it shall be their duty to assess the damages and make report thereof, signed by a majority of their number, and return the same, together with all releases obtained, to the proper Court of Quarter Sessions.

"Section 4. It shall be the duty of the said court to examine carefully the amount of damages assessed as aforesaid; and if said court shall be satisfied that the amount of damages assessed in any case is such that the public interest will be subserved by its payment and the opening of the road, said court shall confirm such view or review, and the assessment of damages which shall be paid as now directed by law; but if said court shall not be satisfied, the said report shall not be confirmed unless the same shall be paid first by the petitioners."

Section 6 of the said Act of February 24, 1845, provides "that from and after the first day of June next, the number of road and bridge viewers appointed by the Court of Quarter Sessions of the County of Beaver shall be three, one of whom shall be a surveyor; and every view and review shall be made by the whole number of persons as appointed, a majority of whom shall concur in their report in order to its confirmation by the court."

## SECTION V.

### OF THE CONFIRMATION OF THE ROAD.

Section 4 of the Act of June 13, 1836, enacts that "if the court shall approve of the report of the viewers allowing a road, they shall direct of what breadth the road so approved shall be opened, and at the next court thereafter the whole proceedings shall be entered on record, and thenceforth such road shall be taken, deemed and allowed to be a lawful public road or highway, or private road, as the case may be."

And section 5 provides that "the breadth of a public road laid out as aforesaid shall not exceed fifty feet, and the breadth of a private road shall not in any case exceed twenty-five feet."

If the Court of Quarter Sessions omit to fix the width of a public road, it is fatal to their proceedings:[1] and the court must fix the breadth by a special order; a general order, applying to all cases not otherwise provided for, is insufficient.[2]

It is the duty of the Court of Quarter Sessions, at the time when they approve of the report of viewers allowing a road, to direct of what breadth it shall be opened. The mere entry of the word "approved" upon the report of viewers allowing a road, amounts to nothing.[3]

The Court of Quarter Sessions has no right to make a material alteration in the report of the view-

[1] Road in Silverlake Township, 3 W. & S. 559. Road from the Wilkesbarré & Bridgewater Turnpike, &c., 4 W. & S. 39.

[2] Norriton and Whitpain Road, 4 Barr 337. Case of the Sheffers-town Road, 5 Barr 515.

[3] Road in Pitt Township, 1 Barr 356.

ers of a road, because it appears that the surveyor has not pursued the directions of the viewers.[4]

The confirmation of the road is entered upon the records of the court in the following manner:

"At a Court of Quarter Sessions of the Peace for the county of held on the day of in the year of our Lord :

A. B., C. D., E. F., G. H., I. J. and K. L., the persons appointed by an order of this Court of Sessions last past, to view and lay out a road from [naming the point of beginning] to [naming the point of termination], do report that in pursuance of the said order they have viewed and laid out and do return for public [or private] use the following road, namely: Beginning [here describe the route as in the return] a plot or draft whereof is to the said report annexed, which report being read at the Sessions, the court approve of and confirm the said road for public [or private] use, and order and direct that it be entered of record, and opened and cleared of the breadth of feet, agreeably to the courses and distances aforesaid, of which the supervisors of the highways of the townships through which the said road runs, are to take notice."

## SECTION VI.

### OF THE OPENING OF THE ROAD.

Section 6 of the Act of June 13, 1836, provides that "public roads or highways laid out, approved

[4] Road from Herr's Mill, 14 S. & R. 204.

and entered on record as aforesaid, shall, as soon as may be practicable, be effectually opened and constantly kept in repair, and all public roads or highways made or to be made, shall at all seasons be kept clear of all impediments to easy and convenient passing and travelling, at the expense of the respective townships, as the law shall direct."

It is necessary that the approval and order of the court fixing the width of a road, shall lie over one term for objections, before the road is opened.[1]

Proceedings for the opening of a road commenced under the provisions of a statute, are arrested by the repeal of the statute; every act towards their completion done after the repeal, is void.[2]

The 10th section of the Act of June 13, 1836, provides that "public roads or highways which have been or shall be laid out on a line which divides two townships, shall be opened, made, kept clear and in repair at the joint and equal charge of such townships, and if either township shall in any such case necessarily incur more than its due proportion of such charge, it shall be lawful for such township to receive from the other township the excess so incurred, in an action to be founded on this Act."*

The following sections of the said Act provide penalties for obstructions and other injuries to public roads, and for injuries to drains opened to free them from water:

[1] Road in Pitt Township, 1 Barr 356.

[2] Case of the North Canal Street Road, 10 Watts 351.

* See *postea* in the chapter upon the duties of supervisors, the section of the Act directing what shall be done when the supervisor of a township neglects or refuses to join in opening, &c., a road lying on the boundary line of two townships.

"Section 67. If any person shall stop, fill up, or injure any drain or ditch made by any supervisor for the purpose of draining the water from any public road or highway, or shall divert or change the course thereof without the authority of the supervisors for the time being, such person shall, for every such offence, forfeit and pay a sum not less than four dollars nor more than twenty dollars.

"Section 68. If any person shall stop or obstruct any public road or highway, or shall commit any nuisance thereon, by felling trees, making fences, turning the road or in any other way, and do not, on notice given by the supervisors of the respective township, forthwith remove the nuisance and repair the damage done to such road, such person shall, for every such offence, forfeit and pay a sum not less than ten dollars nor more than forty dollars: *provided*, that nothing in this section shall be deemed to debar an indictment for any such nuisance, as in case of misdemeanor at common law."

## SECTION VII.

### OF THE REVIEW.

Section 25 of the Act of June 13, 1836, provides that "in all cases of views for any purpose mentioned in this Act, the respective court shall, on petition of any person interested, direct a second view or review for the same purpose: *provided*, that application therefor be made at or before the next term of the said court, after the report upon the first view."

Within the City and County of Philadelphia, reviewers are to be chosen in the same manner as is provided for viewers; (see *ante*); after their appointment, the same proceedings are to be had as are provided by the general provisions of the Act. (Section 80 of the Act of June 13, 1836).

The review of a road is a matter of right, if prayed for by persons interested therein.[1]

The petition for a review of a road must state specifically the object, and that must appear to be clearly within the purview of the Act giving jurisdiction to the court, otherwise the proceedings are irregular. The Court of Quarter Sessions has no authority to grant a review to widen, straighten or fix the limits of a road already laid out and used for many years. Its power is only to lay out, to vacate, and alter or change an established route.[2]

A petition for the review of a road should be signed by the parties in interest, and not by their attorney, and the court have a right to refuse a review on a petition signed by a person as attorney.[3]

A practice in the Court of Quarter Sessions of appointing *twelve* freeholders as reviewers of a road, from which the parties in interest may strike six, the remaining six being the reviewers, is illegal and bad;[4] but the petitioners for a review having prayed for the appointment of twelve and then refused to strike off six because some of the persons named were exceptionable, and applied to the court to appoint others

[1] King's Road, 1 Dallas 11. Berlin Road, 3 Yeates 263. Bachman's Road, 1 Watts 400.

[2] Case of the Church Road, 5 W. & S. 200.

[3] Case of the Shefferstown Road, 3 Watts 475.

[4] Road from the Jonestown Road, &c., 1 Penn. Rep. 243.

in their room, which the court refused and thereupon confirmed the report of the view, the Supreme Court confirmed their proceedings.[5]

The confirmation of a road was reversed because the reviewers had not actually reviewed the road, and because one of the petitioners for the road had been appointed a reviewer.[6]

The appointment of one of the petitioners for a road as reviewer, and his acting as such, are fatal objections to the proceedings. The court will quash the proceedings in such a case.[7]

Where it was not stated in the report of the reviewers of a public road, that they were all sworn [or affirmed?], the proceedings were quashed.[8]

In a case where the County Commissioners had attended the jury or view, and received notice of the jury of review, the Court of Quarter Sessions of Philadelphia county confirmed the report of the jury of review, although the Commissioners had not attended them.[9]

An order of the Court of Quarter Sessions having directed reviewers "to review the ground and places between S. and Y., where the road is required, and if they are of opinion that a road is necessary between the places, to lay it out, &c.," and the reviewers having reported that "*in pursuance of the said order* they had *reviewed*, laid out and returned the following road," &c., it was thereupon held that it might

[5] Road from the Jonestown Road, &c., 1 Penn. Rep. 243.

[6] Case of the Maytown Road, 4 Yeates 479.

[7] Case of the Radnor Road, 5 Binney 612. Road from M'Claysburg, 4 S. & R. 200.

[8] Road from Morrison's Lane, 3 S. & R. 210.

[9] Case of Orthodox Street, 2 Ashmead 28.

be presumed that they had reviewed the ground and places as required by the order.[10]

In April, 1836, a petition was presented to the Court of Quarter Sessions of Bucks county, praying for the appointment of a jury to view and lay out a certain road. Viewers were accordingly appointed, who reported that they had viewed and laid out the road applied for. Their report was filed at the September sessions, 1836, and confirmed *nisi* on the 13th of September. At the December sessions, 1836, a jury of review was petitioned for and appointed, who reported to the February sessions, 1837, that they were unable to agree. This report was confirmed *nisi* on the 14th of February, 1837. On the 13th of May, 1837, the Clerk of the Quarter Sessions issued an order to open the road as laid out by the viewers, which order the Court of Quarter Sessions quashed, and the Supreme Court, upon an appeal, affixed their decree quashing the order.[11]

It is not a sufficient exception to the report of a jury of review in the case of a street in the City of Philadelphia, that the names of absent jurors are not mentioned, the report commencing, "The jurors appointed in the within order of court, &c., report," &c., and being signed by five of the jurors;[12] nor is it a sufficient exception to such report, that it does not state whether the street is necessary for a public or private road—the report "adopting and confirming the report" of the first jury in which the street is laid out as a public street;[13] nor is it a sufficient exception

[10] Spear's Road, 4 Binney 174.

[11] Road in Bucks county, 3 Wharton 105.

[12] [13] The Case of Greenleaf's Court, 4 Wharton 514.

to such report, that it states the jurors to have been "first duly sworn *and* affirmed according to law."[14]

Where there have been a view and review, the Court of Quarter Sessions may adopt either;[15] and this although no exception is made to the report of the reviewers.[16]

Section 54 of the Act of June 13, 1836, provides that the expense of any review of a private or public road shall be wholly paid by the persons applying for the same; and according to section 60, reviewers shall be entitled to receive the like compensation [to that paid viewers, namely one dollar per day] from the persons at whose instance they were appointed, for every day necessarily employed in that service.

Section 58 requires the persons applying for a review, to find and pay a surveyor.

The petition for a review is in the following form:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace for the county of :

"The petition of respectfully showeth that a road has been lately laid out by order of court, from [mentioning the starting point] to [the point of termination] which road if confirmed by the court will be very injurious to your petitioners, and burthensome to the inhabitants of the township [or townships] through which the same will pass. Your petitioners therefore pray your Honours to appoint proper persons to review the said road and parts adjacent, and make report to the court according to law. And your petitioners will ever pray, &c."

[14] The Case of Greenleaf's Court, 4 Wharton 514.

[15] Road from Buckwalter's Orchard, 3 S. & R. 236.

[16] Case of Bachman's Road, 1 Watts 400.

The following is the form of the appointment of reviewers.

"At a Court of Quarter Sessions of the Peace in and for the county of :

"Upon the petition of [naming the petitioners] setting forth [here follows the petition] and therefore praying [as in the petition]: The court upon due consideration do order and appoint L. M., N. O., P. Q., R. S., T. U. and V. W., to review the said road and parts adjacent, and if any five of them review the same, and any four of the actual viewers agree that there is occasion for such a road, they shall proceed to lay out the same, having respect to the best ground for a road, and the shortest distance, and in such a manner as to do the least injury to private property; and that they make report of their proceedings to the next Court of Quarter Sessions to be held for the said county, stating particularly whether they judge the same necessary for a public or private road, together with a plot or draft thereof, and the courses and distances and references to the improvements through which it may pass.

"By the court.

[*Seal.*] J. B., *Clerk.*"

The following is the form of the report of the reviewers when in favour of the road:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace for the county of :

"We the persons appointed to review the road within mentioned and parts adjacent, do report that in pursuance of the said order we did review the same, and have laid out for public use the following road, namely, beginning, &c. [here describe the road fully]. Witness our hands this day of

in the year of our Lord one thousand eight hundred and ."

When the reviewers report against the road, the following form is to be used:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace for the county of :

"We the persons appointed to view the road within mentioned and parts adjacent, do report that in pursuance of the said order, we did review the same, and in our opinion there is no occasion for such a road. Witness our hands this day of in the year of our Lord one thousand eight hundred and ."

Where the reviewers report in favour of the road, it is thus confirmed by the Court of Quarter Sessions.

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and before and Judges of the said court:

"L. M., N. O., P. Q., R. S., T. U. and V. W., the persons appointed by an order of this Court of Sessions last past, to review a certain road laid out from to and parts adjacent, do report that in pursuance of the said order they have reviewed and laid out for public use the following road, to wit: Beginning at [here follow the return of the reviewers] a plot or draft whereof is to the said report annexed; which report having been read in the manner and at the times prescribed by law, the court approve of and confirm the said road for public use, and order and direct that it be entered of record, and shall henceforth be taken, deemed and allowed to be a lawful public road or highway, and the court further

direct that the said road shall be opened of the breadth of feet, agreeably to the courses and distances aforesaid, of which the supervisors of the highways of the townships through which the said road passes, are to take notice and govern themselves accordingly.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

## SECTION VIII.

### OF A SECOND REVIEW OR A RE-REVIEW.

The Court of Quarter Sessions has power to grant a second review;[1] but this is in the discretion of the court.[2]

Under the Act of April 6, 1802 (the provisions of which as to reviews, were similiar to those of the Act of June 13, 1836), it was *held*, that the Court of Quarter Sessions had power to grant a re-review of a road, though the viewers and reviewers had both reported in its favour.[3]

The practice has always been to confine the party to three views, where they have been fair and regular.[4]

A re-review of a road can only be ordered on a petition presented to the court for that purpose, as

[1] Schuylkill Falls' Road, 2 Binney 250.
[2] Case of the Strasburg Road, 2 Yeates 53.
[3] Road from Carlisle, 2 Rawle 124.
[4] Road from Poquessing, 1 Browne 210.

the expenses of re-reviews must be borne by the petitioners.[5]

The objection that a re-review was granted whilst previous proceedings were pending and undetermined, should be made in the court below; if omitted there, it cannot be made in the Supreme Court, to which the proceedings have been removed by certiorari.[6]

A re-review need only be of the ground between two certain points; it need not be of the whole ground before reviewed.[7]

Re-reviewers are not restricted to a simple approbation or rejection of a road as originally reported, but they may return a different one. They are not bound to return a draft of the road which they are directed to re-review, but they may return only a draft of that which they themselves recommend.[8]

An appeal lies to the court from the report of re-reviewers.[9]

It is a fatal exception to the report of re-reviewers that they were not sworn [or affirmed] before they performed the duties of their appointment.[10]

The adoption of the report of re-reviewers is a waiver of the report of viewers, though exceptions thereto are still pending.[11]

Viewers upon a third or any subsequent view are each entitled to receive from the persons at whose instance they were appointed, one dollar for every

[5] [6] [7] Case of the Hellertown Road, 5 W. & S. 202.

[8] Case of a Road in Abington Township, 14 S. & R. 31.

[9] Road from Poquessing, 1 Browne 210.

[10] Case of Bryson's Road, 2 Penn. Rep. 207.

[11] Norriton and Whitpain Road, 4 Barr 337.

day necessarily employed by them in that service. [Section 60.]

As in the case of a review, the petitioners for a re-review are to pay the expenses of the re-review, and provide a surveyor. [Section 58.]

## SECTION IX.

### OF DAMAGES FOR THE OPENING OF PUBLIC ROADS.

The Act of June 13, 1836, makes provision for the payment of damages to persons injured by the opening of public roads, in the following sections:

"Section 7. The owner of any land through which a public road shall be opened as aforesaid, may, within one year from the opening of the same, apply by petition to the Court of Quarter Sessions of the proper county, setting forth the injury which he or she may have sustained thereby, and thereupon the said court shall appoint six disinterested persons to view the premises and assess the damages, if any, which such petitioner may have sustained.

"Section 8. The viewers so appointed shall make report in writing to the next Court of Quarter Sessions, and if their report be approved by the court, the amount of damages awarded shall be paid by the county treasurer out of the county stock, to the party entitled thereto.

"Section 55. The expense of a view to assess the damages sustained by the owner of land taken as aforesaid, for a public road, shall be paid by the respective county."

Section 1st of "an Act concerning roads and road damages in Northampton county," passed April 3, 1846, provides that "the expenses of all road views and the viewers of public roads, and of views to assess damages arising from the opening of public roads in the County of Northampton, shall be paid by the petitioners; and all assessments of damages arising from the opening of such road or roads, shall be paid by the respective townships or boroughs in which the same may be located; and the supervisors or members of the town council of the said townships or boroughs, are hereby authorized to levy a tax for the payment of all such awards or damages, after the same shall have been affirmed by the Court of Quarter Sessions ef the said county."

"Section 9. *Provided*, that in assessing the damages as aforesaid, the viewers shall take into consideration the advantages derived from such road's passing through the land of the complainant."

With respect to damages for opening streets, &c., in the City and County of Philadelphia, the 76th section of the same Act provides that "the proceedings *** to obtain damages in consequence of the laying out or widening [of] any street, road or alley within the City and County of Philadelphia, shall be as follows: All petitions *** for damages occasioned thereby, shall be presented to the Court of Quarter Sessions at least thirty days before the commencement of each term of said court, and thereupon the said court shall direct a venire to issue, directing the sheriff to return a panel of forty-eight freeholders to the next term, to act as viewers in all cases of said applications, from which panel, on the day to which the said venire shall be returnable, the court shall

direct six names to be drawn as viewers to act in each case, who shall be subject to all the provisions of this Act, prescribing the duties of viewers of *** damages."

Section 80 provides that "in all cases of assessment of damages in the said city and county, after the viewers shall be chosen as aforesaid, the same proceedings shall be had as are prescribed by the general provisions of this Act."

It is sufficient if a majority of the viewers concur in adjudging the damages. Where several persons are required to do a *public act* which requires deliberation, they must all be convened, but a majority may decide.[1]

It is no exception to the report of viewers appointed to assess damages for opening a street, that they conversed with the owners of property adjoining, in the absence of the parties interested.[2]

The petition for the appointment of viewers to assess damages for the opening of a road, asking for the appointment of proper persons to view and adjudge *the value of so much improved land* as was taken up for the use of the road," the assessment of damages made thereon was quashed.[3]

The land occupied by a public road is a legitimate subject of consideration in assessing the damages sustained by the owner of the soil.[4]

The circumstance that the owner of the land through which a public road has been opened, was a petitioner for the appointment of viewers of the road,

[1] Case of the Baltimore Turnpike, 5 Binney 481.
[2] Case of Spring Garden Street, 4 Rawle 192.
[3] Quigley's Case, 3 Penn. Rep. 139.
[4] The Case of the Newville Road, 8 Watts 172.

does not preclude his claiming damages for the injury done him by opening it.[5]

The court has no power to grant a review upon the report of the damages sustained by a person from the opening of a public road through his land.[6]

A report is bad which states certain facts, and submits to the court whether upon such facts damages should be given.[7]

A report is bad which finds certain facts, but submits to the court questions of law arising upon them.[8]

A return of the viewers of improved lands, taken up by a public road, that the damages *resulting* to the owner, are valued at £45, is radically bad.[9]

It is not necessary that the jury should expressly state in their report that they find no damages for persons whose claims have been submitted to them and decided upon.[10]

Where damages have been awarded in consequence of the opening of a street in the City or County of Philadelphia, through private property, the court will not grant the certificate required by law for the payment to the owners of the soil, without first inquiring whether there are any incumbrances, and directing the appropriation accordingly.[11]

After the expiration of a year from the return of the viewers appointed to assess the damages occasioned by the opening of a street in the City or County of Philadelphia, if such damages shall not be paid, all

[5] [6] The Case of the Newville Road, 8 Watts 172.

[7] Road from Point-no-Point to the Frankford Road, 2 S. & R. 277.

[8] Case of the Germantown & Perkiomen Road, 4 Rawle 191.

[9] Feree *v.* Meily et al., 3 Yeates 153.

[10] Road from Point-no-Point to the Frankford Road, 2 S. & R. 277.

[11] In the Matter of Noble Street, 1 Ashmead 276.

the proceedings in relation to such street, become void; although the non-payment of the damages arises from the want of funds in the county treasury.[12]*

The petition for the appointment of viewers for damages, is as follows:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace for the county of :

"The petition of respectfully showeth, that a public road or highway was lately laid out and opened by order of the court, from to , which road is laid out and opened through the land of your petitioners. Your petitioners therefore humbly pray your Honours to appoint proper persons to view and adjudge the value of so much of their lands respectively, as is or may be taken up for the use of the said road; and your petitioners will ever pray, &c."

The appointment of the viewers of damages, is made as follows:

"At a Court of Quarter Sessions of the Peace in and for the county of , held :

[12] Commonwealth *v.* The County Commissioners, 2 Wharton 286.

* The following decisions refer to suits brought by individuals, for consequential damages for the opening of streets, &c.

When the corporate officers of a borough are authorized by its Act of incorporation to improve and repair the streets, they do not by so doing subject the borough to an action by an individual, for a consequent injury to his property by reason of such improvement. But when there are allegation and proof of malice and of a wanton disregard of private right, the law seems to be otherwise. Greene *v.* The Borough of Reading, 9 Watts 382.

Neither the state nor a natural or artificial person acting by its authority under a law which the Legislature is competent to make, is answerable for consequential damages occasioned by the construction of a highway, further than is specially provided by the law itself. Henry *v.* The Pittsburgh and Allegheny Bridge Company, 8 W. & S. 85.

"Upon the petition of stating [as in the petition], and therefore praying [as in the petition], the court upon due consideration, do order and appoint F. G., H. I., J. K., L. M., N. O. and P. Q., to view and adjudge the amount of damage (if any) sustained by the petitioners by reason of the said road; who and every of whom, before they proceed to assess the damages, shall take the oath or affirmation prescribed by the Act of Assembly: and the court do further order, that the said petitioners give notice of the time of holding such view, to one or more of the commissioners of county, and that the viewers aforesaid do make report of their proceedings herein, to the next court according to law.

"By the court.

[*Seal.*] J. B., *Clerk.*"

The oath or affirmation to be taken by the viewers is to be administered as follows:

"You and each of you do swear [or solemnly, sincerely and truly declare and affirm] that you will justly and truly value the damages (if any) which the petitioners in this order mentioned have sustained by reason of the road which has been laid out through their lands, and that you will also consider the advantage as well as the disadvantage of the said road. So help you God [or, and this you do affirm]."

The report is thus made:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace in and for the county of :

"We the subscribers, appointed by the within order of court to view and adjudge the value of so much of the lands of A. B., C. D. and E. F., as are taken up by the road therein mentioned, do value and adjudge

the loss thereby occasioned to the within named A. B., at the sum of dollars, the loss thereby occasioned to the within named C. D. at dollars, and the loss thereby occasioned to the within named E. F. at dollars, respectively. Witness our hands this day of in the year of our Lord one thousand eight hundred and ."

The confirmation by the court is thus entered:

"F. G., H. I., J. K., L. M., N. O. and P. Q. [or any five of them], the persons appointed by the order of this court of sessions, in the year of our Lord one thousand eight hundred and , to view and adjudge the value of so much of the lands of A. B., C. D. and E. F., as are taken up by the road leading from to , do report that they have valued and adjudged the loss thereby occasioned to the said A. B. at the sum of dollars, the loss thereby occasioned to the said C. D. at dollars, and the loss thereby occasioned to the said E. F. at dollars respectively; which report being read, the court on due consideration do approve of and confirm the same, and direct the said sum of dollars to be paid to the said A. B., the said sum of dollars to be paid to the said C. D., and the said sum of dollars to be paid to the said E. F., by the treasurer of the county of , out of the county stock.

"By the court.

[*Seal.*] J. B., *Clerk.*"

## SECTION X.

### OF THE LAYING OUT OF ROADS UPON COUNTY LINES.

Section 26 of the Act of June 13, 1836, provides that "Roads upon and along a line which divides two adjoining counties may be laid out *** in the manner provided in the case of other roads, except that the Court of Quarter Sessions of each of the said counties, shall appoint three of the viewers, and that a report as aforesaid shall be made to the said courts respectively, and that the said courts shall otherwise have and exercise concurrent jurisdiction therein."

The following are the forms used in case of applications for the laying out of roads upon county lines:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace of the county of :

"The petition of the subscribers inhabitants of the counties of and respectfully represents:

"That your petitioners labour under great inconveniences for want of a public road or highway to lead upon the line which divides the said counties from in county, to in county.

"Your petitioners therefore pray the court to appoint proper persons to view and lay out the same according to law.

"And they will ever pray, &c."

A copy of the foregoing is to be presented to the Court of Quarter Sessions of each of the respective counties. The order of court is as follows:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"Upon the petition of sundry inhabitants of the counties of and setting forth that they labour under great inconveniences for want of a public road or highway to lead upon the line which divides the said counties from in county, to in county, and therefore praying the court to appoint proper persons to view and lay out the same according to law. Whereupon the court upon due consideration had of the premises, do order and appoint upon behalf of county aforesaid, G. H., I. J., and K. L., who after being respectively sworn or affirmed to perform the duties of their appointment with impartiality and fidelity, together with three persons similarly appointed by the Court of Quarter Sessions of the county of , are to view the ground proposed for the said road; and if they or any five of them view the same, and any four of the actual viewers agree that there is occasion for such road, they shall proceed to lay out the same as agreeable to the desire of the petitioners as may be, having respect to the best ground for a road and the shortest distance, in such manner as to do the least injury to private property; and make duplicate reports thereof, stating particularly whether they judge the same necessary for a public or private road, together with a plot or draft thereof, and the courses and distances, and reference to the improvements through which it may pass, and also that they have been sworn or affirmed according to law; one of which said reports to be made to the next Court of

Quarter Sessions to be held for the county of , and the other to the next Court of Quarter Sessions to be held for the county of .

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The report if in favour of the road proposed, is as follows:

"To the Honourable the Judges within named:

"We the subscribers appointed by the within order of court, and by a similar order from the Court of Quarter Sessions of the county of , to view and lay out the road therein mentioned, do report, that in pursuance of the said orders, having been respectively sworn or affirmed according to law, we have viewed and laid out and do return for public [or private] use the following road, namely: Beginning at [here describe the road in full with the courses and distances, and reference to the improvements through which it will pass] a plot or draft whereof is hereunto annexed. Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

If unfavourable to the road, the report will run as follows:

"To the Honourable the Judges within named:

"We the subscribers appointed by the within order of court, and a similar order from the Court of Quarter Sessions of the county of , do report, that in pursuance of the said orders, having been respectively sworn or affirmed according to law, we have viewed the route of the proposed road as within mentioned, and are of opinion that there is no occasion to lay out the same. Witness our hands and

seals this day of in the year of our Lord one thousand eight hundred and ."

A report in favour of the proposed road is thus confirmed:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"The persons appointed by an order of this court of sessions last past, and by a similar order of the Court of Quarter Sessions of the county of , to view and lay out a road on the line dividing the said counties from in county, to in county, do report, that in pursuance of said orders they have viewed and laid out and do report for public [or private] use the following road, to wit: Beginning [here describe the road fully according to the report] a plot or draft whereof is to the said report annexed, which report being read in the manner and at the times prescribed by law, this court (the court of the county of concurring therein) do approve of and confirm the said road for public [or private] use, and order and direct that it be entered of record, and shall from henceforth be taken, decreed and allowed to be a lawful public [or private] road or highway; and the court further direct that the said road shall be opened of the breadth of feet, agreeably to the courses and distances aforesaid, of which the supervisors of the highways of the townships through which the said road passes, are to take notice and govern themselves accordingly.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

## SECTION XI.

### OF PRIVATE ROADS.

The provisions of the Act of June 13, 1836, respecting private roads, are as follows:

"Section 11. The several Courts of Quarter Sessions shall, in open court as aforesaid, upon the petition of one or more persons for a road from their respective dwellings or plantations to a highway or place of necessary public resort, or to any private way leading to a highway, direct a view to be had of the place where such road is requested, and a report thereof to be made in the same manner as is before directed in this Act.

"Section 12. If it shall appear, by the report of viewers to the court directing the view, that such road is necessary, the court shall direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road."

The 5th section of the Act provides that "the breadth of a private road shall not in any case exceed twenty-five feet."

"Section 15. All private roads shall be opened, fenced and kept in repair by and at the expense of the person or persons respectively, at whose request the same were granted and laid out, and by their heirs and assigns.

"Section 16. The damages sustained by the

owners of the land through which any private road may pass, shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons at whose request the road was granted or laid out: *provided*, that no such road shall be opened before the damages shall be fully paid."

Section 55 provides that the expense of a view to assess the damages sustained by the owner of land "in the case of a private road, shall be paid by the person or persons at whose instance the same was allowed."

"Section 17. Whenever any person shall be desirous to make use of a private road laid out on the petition, and at the expense of others, such person may apply by petition to the Court of Quarter Sessions of the respective county, to be admitted to participate in the privilege of the said road, and thereupon such court shall have power to determine what sum he shall contribute to the persons at whose expense the said road was laid out, and also what further sum he shall pay to the owners of the soil over which the said road was made, and upon the payment thereof, such person shall be entitled to equal rights and privileges, and be subject to like duties and liabilities with the original applicants for said road."

Section 54 provides that "the expense of views of private roads, and the expense of any review, or of any view subsequent to a review of a private road, shall be wholly paid by the persons applying for the same," and according to section 58, "in all cases of a view or review, or of any view subsequent to a review of a road, a surveyor shall be found and paid by the persons applying for such views."

The following sections relate to the hanging of gates across private roads.

"Section 13. In all cases of a private road it shall be lawful for the owners of the land over which the same may be laid out, or authorized, to apply to the court aforesaid for leave to hang and maintain at their own expense, swinging gates across such road; and thereupon the court shall direct the viewers appointed to view such road, or in case the road has been already laid out, may appoint other viewers in manner aforesaid, to inquire and report whether the same may be done without much inconvenience to the persons using such road.

"Section 14. If it shall appear to the court that a gate or gates may be hung as aforesaid, according to the prayer of the party, without much inconvenience to the person or persons using such road, they shall decree accordingly; and in such decree they shall order and direct that such gate or gates shall be made and kept in repair, and made easy for passing, by the respective owners of such land."

"Section 57. In case of a separate view directed upon an application for leave to hang and maintain gates across a private road, as aforesaid, the expense of such view shall be paid by the applicants."

The provisions of the 52d section that "no view which may be had for any of the purposes aforesaid, shall be good and valid unless five of the persons appointed for the purpose shall view the place in question, nor unless four of the actual viewers concur in the report," apply to views of private roads.

Section 1 of an Act passed March 16, 1847, enacts "that from and after the passage of this Act, all obstructions to private roads shall be considered a

nuisance, and shall be subject to the same fines, forfeitures and penalties, and to be proceeded against in the same way as in cases of obstructions to public roads or highways."

A road from the plantation or dwelling house of the petitioner to or from the public highway or any place of public resort as described in the 17th section of the Act of April 6, 1802 [to which the Act of June 13, 1836, is similar] is a private road to be laid out, &c., in the manner therein prescribed, and there is no authority in any Court of Quarter Sessions to have it laid out as a public road.[1]

A road leading from the house of A. into a public road may be confirmed as a private road, though the viewers have not reported that it was necessary as a private road.[2]

An order of confirmation of a private road need not specify how it must be opened and kept in repair.[3]

If the viewers lay out a private road partly on a public road, it is fatal to their proceedings; although the records of the court do not show that a formal order had issued to open the public road.[4]

A petition having been presented for a public road, and the viewers having made a report in favour of the road as a private road, they cannot maintain an action against the petitioner for their services; the Act of Assembly of April 6, 1802 [identical in this respect with the Act of June 13, 1836,] which provides that the expense of views of a private road

[1] Road from Matthew Miller's house, 9 S. & R. 34.

[2] [3] Case of Kyle's Road, 4 Yeates 514.

[4] Case of Neeld's Road, 1 Barr 353.

shall be paid by the petitioners, being confined to cases of *applications* for a private road.[5]

A., having a right of way by deed across the land of B., applied with eight other persons (who were strangers to the grant) to the Quarter Sessions for a private road over B.'s ground, which was accordingly laid out. Notwithstanding the existence of this right of way, B. is entitled to damages for the opening of the road.[6] In such a case the report of the jury is not erroneous because it does not designate who shall pay the damage assessed, the law fixing that obligation upon those at whose request the road was granted.[7]

On the 16th of April, 1838, an Act was passed, the 17th section of which, relating to roads beneath the surface to coal mines, is as follows:

"From and after the passage of this Act, it shall and may be lawful for the several Courts of Quarter Sessions, upon application of any person or persons for a private road under the surface of any land to coal mines, to cause a view to be had of the same premises, and upon return of viewers that said road is necessary, then the said court shall cause the same to be entered on record, and thenceforth such road shall be deemed and taken to be a lawful private road, shall be opened by the person or persons making application for the same, and shall be kept in repair at their exclusive cost: *provided*, that the viewers, appointed as aforesaid, before making their return to the court, shall assess the amount of damages sustained by the owner or owners of lands

[5] Ernst *v.* Baker, 1 Browne 326.

[6] [7] Case of the Road from the Lazaretto, 1 Ashmead 417.

through which the said road shall be made, and embody the same in their report to the court; which damages, as assessed by said viewers, shall be paid by the person or persons making application for such road, to the owner or owners of such land."

It has been decided that this section, to give it effect, must be considered as part of the general road system of Pennsylvania, regard being had to its special provisions.[8]

The petition for a private road is in the following form:

"To the Honourable the Judges of the Court of Quarter Sessions of the county of :

"The petition of A. B. of the said county, respectfully represents,

"That your petitioner labours under great inconvenience for want of a private road to lead from his plantation [or dwelling house] to the public road running from to in the said county. He therefore prays the court to appoint proper persons to view and lay out the same according to law. And he will ever pray, &c."

The order for a view and the subsequent proceedings on an application for a private road, are similar to those in the case of a public road, except that in the order these words should be omitted, "stating particularly whether they judge the same necessary for a public or private road."

The petition for the appointment of viewers of the damage occasioned by a private road, is in the following form:

"To the Honourable the Judges of the Court of

[8] Case of Neeld's Road, 1 Barr 353.

Quarter Sessions of the Peace in and for the county of :

"The petition of A. B. and C. D., respectfully showeth, that a private road has been lately laid out and opened by the order of this court, on the petition of W. X. and Y. Z., extending over the lands of your petitioners; your petitioners therefore pray your Honours to appoint proper persons to value their lands so as aforesaid taken up for the use of the said road, and to settle and ascertain the proportions to be paid to them by the several persons for whose use the same is laid out. And they will ever pray, &c."

The appointment of the viewers, the oath, and the return of the viewers, are similar to those in the case of public roads, *ante*, except that the appointment should direct the viewers "to value the lands of the petitioners so taken up for the use of the said road, and to settle and ascertain the proportions to be paid to them by the several persons for whose use the same is laid out," to which the oath of the viewers and their return should correspond.

The petition for a gate or gates on a private road is as follows:

"To the Honourable the Judges of the Court of Quarter Sessions of county:

"The petition of and respectfully showeth, that your petitioners labour under great inconveniences for want of the privilege of hanging a swinging gate or gates in a private road leading from to . They therefore humbly pray the court to appoint proper persons to view and judge of the utility of granting them the privilege aforesaid. And they will ever pray, &c."

The appointment of viewers is thus made:

"At a Court of Quarter Sessions of the Peace for the county of held :

"Upon the petition of and stating that they labour under great inconveniences for want of the privilege of hanging a swinging gate or gates in a private road leading from to and praying the court to appoint proper persons to view and judge of the utility of granting them this privilege, the court upon due consideration had of the premises, do order and appoint L. M., N. O., P. Q., R. S., T. U. and V. W., to view the said road, and inquire and judge whether such gate or gates may, without much inconvenience to the persons for whose use the said road was granted, be hung in the same, and do direct that they or any four of them do make report accordingly to the next Court of Quarter Sessions."

The viewers' report, if favourable, is as follows:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace for the county of :

"We the persons appointed by the within order to view and judge of the propriety of hanging a gate or gates in the road therein mentioned, do report that we have viewed the premises, and are of opinion that a gate may be hung upon the said road at and another gate at according to the prayer of the petitioners, without inconvenience to the persons using the said road. Witness our hands this day of in the year of our Lord one thousand eight hundred and ."

The confirmation of the report is thus entered:

"L. M., N. O., P. Q., R. S., T. U. and V. W., [or any four of them] the persons appointed by the order of this court of sessions, in the year of our Lord one thousand eight hundred and , upon

the petition of and for the privilege of hanging a swinging gate or gates in a private road leading from to , to view and judge of the utility of granting them this privilege, do report that they have viewed the premises, and are of opinion that a gate may be hung upon the said road at and another gate at according to the prayer of the petitioners, without inconvenience to the persons using the said road, which report being read, the court upon due consideration do approve of and confirm the same, and do order that the said gates may be hung upon the said road accordingly, and that the same shall be made and kept in repair by the owner of the said land, and made easy for the passage of persons using the said road."

When the viewers report against the proposed gates, their report should be like that in favour as far as the words "are of opinion that" inclusive, after which it should run thus,

"gates cannot be hung upon the said road according to the prayer of the petitioners without inconvenience to the persons using the said road. Witness," &c. [as before.]

## CHAPTER IV.

### OF THE VACATING OF ROADS.

The Act of June 13, 1836, contains the following provisions for the vacating of roads:

"Section 18. The courts aforesaid [the Quarter Sessions] shall within their respective counties, have authority, upon application to them by petition, to inquire of and change or vacate the whole or any part of any private or public road which may have been laid out by authority of law, whenever the same shall become useless, inconvenient or burdensome, and the said courts shall proceed therein by views and reviews, in the manner provided for the laying out of the public roads and highways.

"Section 19. Roads laid out and confirmed as aforesaid, but not opened, may be vacated and annulled upon the petition of a majority of the original petitioners of the said road, resident within the respective county, in the same manner as other roads may be vacated: *provided*, that no person residing or owning land along the route of such road, shall in such case be a viewer or reviewer."

"Section 22. *Provided*, that nothing in this Act shall be construed to give authority to any of the courts of the commonwealth, to vacate any lane, street or highway within any city, borough, town

plot or village laid out by the late proprietaries or by any other person, and dedicated to the public use; nor to vacate any cartway laid out by the order of court and not repairable at the charge of the public; nor shall such authority extend to any road, way or passage claimed by any person as a private right, nor to rivers or streams of water.

"Section 23. Every application to vacate any road as aforesaid, shall be in writing and signed by the applicants; it shall set forth in a clear and distinct manner the situation and other circumstances of such road or highway, or the part thereof which the applicants may desire to have vacated as aforesaid.

"Section 24. Whenever the whole or any part of a road shall be changed or supplied, the same shall not be shut up or stopped until the road laid out to supply the place thereof, shall be actually opened and made."

"Section 26. Roads upon and along a line which divides two adjoining counties, may be altered and vacated in the manner provided in the case of other roads, except that the Court of Quarter Sessions of each of the said counties shall appoint three of the viewers, and that a report as aforesaid shall be made to the said courts respectively, and that the said courts shall otherwise have and exercise concurrent jurisdiction therein."

An order to view and vacate a public road is not a matter of right in the petitioner, but of discretion in the Court of Quarter Sessions.[1]

The report of reviewers vacating an old road and substituting a new one, must be accompanied by a

[1] Case of the Newville Road, 8 Watts 172.

plot or draft of the part vacated as well as of the new road substituted, with the courses and distances.[2]

The uniform practice under the road laws has been to allow two full terms for exceptions to the reports of juries, as well on proceedings for vacating as opening roads, and as well in the City of Philadelphia as elsewhere.[3]

A jury having been appointed on the 12th of October, 1835, to report on the expediency of vacating a street in the City of Philadelphia, made their report on the 19th of the same month, which was confirmed *nisi* on the 26th of the same month, and on the 13th of January, 1836, their report was confirmed absolutely. The Supreme Court quashed the proceedings.[4]

The Court of Quarter Sessions having confirmed the report of a jury which reported in favour of vacating a road in a borough, the Supreme Court refused to reverse their decree, on the ground that the *road* vacated was a *street* and within the jurisdiction in section 22 of the Act of June 13, 1836, that fact not appearing upon the face of the proceedings.[5]

A petition being presented for the *vacation* of a road, the Court of Quarter Sessions appointed viewers; but the order to the viewers directed them to proceed *to lay out* the road, &c. The viewers reported in favour of vacating the road, and no exception having been made in the court below, the Supreme Court affirmed the proceedings.[6]

[2] Case of Rutherford's Road, 10 S. & R. 120.

[3] [4] Case of Adelphi Street, 2 Wharton 174.

[5] [6] Case of the Allentown Road, 5 Wharton 442.

The 44th section of "an Act authorizing the laying out of certain state roads and for other purposes," passed April 5, 1843, authorizes the commissioners appointed by the 43d section of the Act to review that part of the state road from Allentown to West Chester, which lies between Allentown and Pottstown, to vacate so much of any road as may be supplied by the new one, if it should appear expedient so to do, and the 46th section of the said Act repeals the 20th section of the Act of June 13, 1836, (empowering the Court of Quarter Sessions to vacate roads), so far as relates to the said Act of April 5, 1843.

"A Supplement to the Act relating to roads, bridges and highways," passed on the 21st of April, 1846, extends the powers of the Courts of Quarter Sessions as to vacating roads, by providing "that the powers of the Courts of Quarter Sessions of this commonwealth, to vacate public and private roads, are hereby extended to all roads, whether laid out by authority of law, or existing by prescription or lapse of time, and generally to all roads except private roads, resting upon express grant, the evidence of which is still in existence, excepting in such counties as the power to lay out and vacate public roads is, or may be, vested in some other tribunal than in the Court of Quarter Sessions of the Peace; excepting also roads laid out by Act of Assembly, and [which] are expressly exempted from the jurisdiction of said courts."

The following are the forms used in cases where the road has been laid out and confirmed, but not opened, and a majority of the original petitioners

pray for the annulling of the road. [See Section 19, *ante.*]

"To the Honourable the Judges of the Court of Quarter Sessions in and for the county of :

"The petition of the subscribers, inhabitants residing in the said county, being a majority of the original petitioners, respectfully represents,

"That a petition was presented to this court of sessions in the year of our Lord , signed by your petitioners, praying the court to appoint proper persons to view and lay out a road from to , which was accordingly done, and the said viewers so appointed, after being duly qualified according to law, did view and lay out and returned for public [or private] use, a road beginning [here describe the road according to the return], which was on due consideration approved of and confirmed by the court; that the said road not yet having been opened, and it appearing to your petitioners to be useless, and if opened would become burthensome, your petitioners therefore pray the court to appoint proper persons, not residing on the route of the said road, to view the same and make report according to law.

"And your petitioners will ever pray, &c."

The order of court appointing the viewers prayed for, is as follows:

"At a Court of Quarter Sessions of the Peace for the county of held on the day of in the year of our Lord one thousand eight hundred and :

"Upon a petition of sundry inhabitants residing in the said county, being a majority of the original petitioners, stating that a petition was presented to this

court of sessions in the year of our Lord , signed by the said petitioners, praying the court to appoint proper persons to view and lay out a road from to , which was accordingly done; and the said viewers so appointed, after being duly qualified according to law, did view and lay out and return for public or private use, a road beginning [here describe the road as in the petition], which was on due consideration approved of and confirmed by the court; that the said road not yet having been opened, and it appearing to the said petitioners to be useless, and, if opened, would become burthensome; and therefore praying the court to appoint proper persons not residing on the route of the said road, to view the same and make report according to law: whereupon the court do order and appoint G. H., I. J., K. L., M. N., O. P. and Q. R., who, after being respectively sworn or affirmed to perform the duties of their appointment with impartiality and fidelity, are to view the said road so laid out, and to consider and judge whether in their opinion the said road, if opened, will be useless and burthensome; and if they or any five of them view the said road, and any four of the actual viewers agree that the said road, if opened, will be useless and burthensome, they are to make report accordingly, stating also that they have been sworn or affirmed according to law; which said report is to be made to the next Court of Quarter Sessions to be held for the said county.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The report should be as follows:

"To the Honourable the Judges within named:

"We the subscribers appointed by the within order

of court, to view the road therein mentioned, do report that in pursuance of the said order, having been respectively sworn or affirmed according to law, we have viewed the said road, and are of opinion that the same if opened, will [or will not] be useless and burthensome. Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

The report, if in favour of annulling the road, is thus confirmed:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"G. H., I. J., K. L., M. N., O. P. and Q. R., the persons appointed by order of this court of sessions in the year of our Lord one thousand eight hundred and , to view a road laid out from to , and to consider and judge whether the said road, if opened, will be useless and burthensome, who having been sworn or affirmed according to law, do report that they have viewed the said road, and are of opinion that the same, if opened, will be useless and burthensome:

"Whereupon the court do approve of and confirm the said report, and order that the confirmation heretofore made by this court of the report and proceedings had to lay out the said road, be annulled.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The petition for the vacating of a road is as follows:

"To the Honourable the Judges of the Court of Quarter Sessions of the county of :

"The petition of the undersigned, inhabitants of

the township [or townships] of in the said county, respectfully represents:

"That a road has been laid out from to , which road [or, part of which road, beginning at and ending at ], your petitioners conceive is now become useless, inconvenient and burthensome to the inhabitants of the said township [or townships]. Your petitioners therefore pray the court that the said road may be vacated, agreeably to the Act of Assembly in such case made and provided. And they will ever pray, &c."

The order upon which is as follows:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"Upon the petition of sundry inhabitants of the township [or townships] of in the said county, stating that a road had been laid out from to , which road [or part of which road beginning at and ending at ] the petitioners conceive is now become useless, inconvenient and burthensome to the inhabitants of the said township [or townships], and therefore praying that the said road may be vacated agreeably to the Act of Assembly in such case made and provided, whereupon the court do order and appoint G. H., I. J., K. L., M. N., O. P. and Q. R., who after being respectively sworn or affirmed to perform the duties of their appointment with impartiality and fidelity, are to view the road in the said petition prayed to be vacated, and to consider and judge whether it is become useless, inconvenient and burthensome; and if they, or any five of them view the said road, and any four of the actual

viewers agree that the same is become useless, inconvenient and burthensome, they are to make report accordingly to the next Court of Quarter Sessions to be held for the said county. In which report they shall state that they have been sworn or affirmed according to law.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The report is as follows:

"To the Honourable the Judges within named:

"We the subscribers appointed by the within order of court to view the road therein mentioned, do report that in pursuance of the said order, having been respectively sworn or affirmed according to law, we have viewed the said road, and are of opinion that the same is [or is not] useless, inconvenient and burthensome, and therefore ought [or ought not] to be vacated. Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

The report when in favour of vacating the road is thus confirmed:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"The persons appointed by order of this court of sessions, in the year of our Lord one thousand eight hundred and , to view a road leading from to and to consider and judge whether the same is become useless, inconvenient and burthensome, who, having been duly sworn or affirmed according to law, report that they have viewed the road therein mentioned, and are of opi-

nion that it is become useless, inconvenient and burthensome to the inhabitants of the township [or townships] through which it passes, and ought to be vacated: Whereupon the court approve of and confirm the said report, and order that the said road be vacated accordingly.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The petition for the vacating of state roads [see section 20 of the Act of June 13, 1836, *ante*] and the proceedings thereon, are in substance the same as those in the case of county roads. The following is the form of the petition for the vacating of a state road rendered useless by the making of a turnpike road. [See section 21, *ante.*]

"To the Honourable the Judges of the Court of Quarter Sessions of county:

"The petition of the subscribers respectfully represents:

"That part of the state road leading from to in the township [or townships] of in the said county, has been supplied and rendered useless by a substantial and permanent turnpike road made and completed according to law from to .

"Your petitioners therefore pray the court to appoint proper persons to view the said state road so supplied and rendered useless, and make report to the court according to law. And they will ever pray, &c."

The order to view, the report and confirmation are in substance the same as in the case of the vacation of a county road.

## CHAPTER V.

### OF BRIDGES.

The Act of June 13, 1836, contains the following provisions upon this subject.

"Section 34. Where a small creek over which a bridge may be necessary, shall be on the boundary or on the division line of townships, the bridge shall be built and maintained at the joint and equal expense of the said townships, by their respective supervisors, in the manner directed by law in the case of public roads which may be the division line of townships.

"Section 35. When any river, creek or rivulet over which it may be necessary to erect a bridge, crosses a public road or highway, and the erecting of such bridge requires more expense than it is reasonable that one or two adjoining townships should bear, the court having jurisdiction as aforesaid, shall, on the representation of the supervisors, or on the petition of any of the inhabitants of the respective townships, order a view in the manner provided for in the case of roads; and if on the report of viewers, it shall appear to the court, grand jury and commissioners of the county, that such bridge is necessary, and would be too expensive for such township or townships, it shall be entered on record as a county bridge.

"Section 36. Whenever a bridge shall be authorized and recorded as a county bridge, it shall be the duty of the commissioners to procure an estimate of the cost thereof, and provide in the county levies, the moneys necessary to defray the same, and proceed to have such bridge erected by contract or otherwise, as shall seem to them expedient.

"Section 37. Viewers of the site of a bridge appointed as aforesaid, shall have authority by virtue of their appointment, to report also whether any change in the course or bed of the road to be connected therewith, will be necessary, in order to the erection of such bridge at the most suitable place, or at the least expense, or in the best manner; and the same being approved by the commissioners of the county and also by the court, such road shall be altered accordingly.

"Section 38. *Provided nevertheless*, that the viewers shall cause every such variation to be accurately surveyed, and a plot thereof to be made and returned with their report.

"Section 39. Every bridge erected by the commissioners of any county, or under contract with them, shall be inspected by six fit persons to be appointed by the Court of Quarter Sessions of the respective county, and report thereof shall be made by them to the said court.

"Section 40. If any such bridge shall be approved by the court, and the same shall have been erected under contract with the commissioners as aforesaid, the money shall be paid agreeably to such contract.

"Section 41. If the persons appointed to inspect any bridge erected by contract as aforesaid, shall not approve of the same, they shall report to the court

what sum, in their judgment, ought to be deducted from the sum stipulated in such contract; and thereupon the court shall grant a rule upon the builder or contractor, to show cause against the said report, at a time and place in such rule to be named.

"Section 42. After the service and return of such rule, it shall be lawful for the builder or contractor to file a declaration or statement in the Court of Common Pleas of the respective county, upon the contract made by him with the commissioners aforesaid, and thereupon proceed to trial, in due course, in like manner as if an action had been commenced by him upon such contract, against the county, or at his election he may show cause against the said report, and thereupon the said court shall determine the matter as justice and equity shall require.

"Section 43. When any such bridge shall be erected by the commissioners of the county, or under their superintendence, if the same shall not be approved by the persons aforesaid to inspect the same, they shall report in what respect the said bridge is deficient, and whether or not the same has occurred through the default, neglect or official misconduct of the said commissioners, or any of them, and what in their judgment is the value of such bridge, and thereupon the court shall in like manner grant a rule upon the commissioners to show cause against such report.

"Section 44. After the service and return of such rule, it shall be lawful for the commissioners to have an issue directed upon the said report, in the matters aforesaid, to the Court of Common Pleas of the respective county, to be tried by a jury, or, at their election, they may show cause against the same, and

thereupon the court shall determine the matter in a summary way.

"Section 45. If it shall appear upon the trial of such issue, or upon investigation by the court as aforesaid, that such bridge is insufficient, or that it has been erected at an expense greater than its value, through the neglect or official misconduct of any one or more of the said commissioners, it shall be lawful for the county to recover, against such delinquent commissioner or commissioners, the damages sustained by reason of the default of them or either of them as aforesaid respectively.

"Section 46. Bridges over any river, creek or rivulet, being on the line of adjoining counties, shall be authorized in the manner provided in the case of other county bridges, except that the Court of Quarter Sessions of each county shall appoint three of the viewers, and that a report as aforesaid be made to the said courts respectively, and that the said courts shall, together with the grand juries and commissioners of the respective counties, in all other respects, have and exercise a concurrent jurisdiction and discretion therein.

"Section 47. Every such bridge shall be constructed by contract with the commissioners of both the said counties; it shall be inspected in the manner aforesaid by persons appointed by the Court of Quarter Sessions of either of the said counties; it shall be maintained and kept in repair by said commissioners at the joint and equal charge of both counties, and if either county shall necessarily incur more than its due proportion of such charge, it shall be lawful for such county to recover from the other county the excess so incurred in an action to be founded upon this Act.

"Section 48. It shall be lawful for the undertaker of any public bridge to enter upon the lands and enclosures near to the place where such bridge is to be built, for the purpose of searching for and procuring the materials necessary for the building of such bridge, in like manner and with like authority as is hereinbefore provided in behalf of the supervisors of the public roads in the like case. [See *post*, in the chapter on Supervisors.]

"Section 49. If the undertaker of such bridge and the owner of such materials cannot agree upon the sum to be paid for the damages which may be done by the taker of such materials, such damages shall be ascertained in the manner provided in the case of materials taken by the supervisors of the public roads. [See *post*, in chapter on Supervisors.]

"Section 50. *Provided nevertheless*, that the damages shall be ascertained and paid, or secured to be paid, to the satisfaction of the owner of such materials, before the same may be dug, quarried or removed by such undertaker."

"Section 56. The expense of the inspection or view of a county bridge as aforesaid, shall be paid by the respective county; but if such bridge shall not be approved, the said expense shall be recoverable by such county, as damages against the delinquent commissioner or contractor."

Under the Act of June 13, 1836, the Court of Quarter Sessions may authorize the erection of a bridge over any river or stream through a public highway.[1]

To make a bridge a county charge, it must ap-

[1] Bridge over Smithfield Creek, 6 Wharton 363.

pear by the report of the viewers that five of them had viewed the place, and such bridge was necessary.[2]

Under the Act of June 13, 1836, the report of the viewers upon the subject of a bridge must be made to the *next* term. A report having been made on February 3, 1841, upon an order made on the preceding day, the proceedings were quashed.[3]

There is nothing in the Acts of Assembly relating to bridges, to prevent the county commissioners from building new bridges over any stream, provided that such bridges are approved of in the manner declared in section 35 of the Act of June 13, 1836:[4] Therefore when the superstructure of a county bridge had been swept away by a freshet, it was held that the county commissioners (though perhaps bound to repair it), might erect a new bridge over the same stream at another place; and that an order of the Quarter Sessions for the appointment of viewers for such purpose was regular and proper, though there was no application to vacate the former bridge.[5]

A bridge erected over the Conococheague creek by Franklin county, having been pulled down by the Chambersburgh & Bedford Turnpike Road Company, who erected a new bridge in its place, it was decided that the materials of the old bridge belonged to the county, and that the turnpike company had no right to convert them to their own use.[6]

An Act of Assembly requiring a canal company to erect and keep in repair a bridge wherever the canal crosses a public or private laid out road, does not apply to a road merely dedicated to public use,

[2] [3] [4] [5] Bridge over Smithfield Creek, 6 Wharton 363.

[6] Chambersburgh & Bedford Turnpike Road Company *v.* The Commissioners of Franklin county, 6 S. & R. 229.

over which the supervisors have not exercised any authority.[7]

The following sections of the Act of June 13, 1836, relate to the preservation of bridges.

"Section 63. The supervisors aforesaid shall, within their respective townships, put up and maintain in a conspicuous place, at or near each end of all bridges erected at the expense of the public, having an arch of the length or span of forty-five feet or upwards, a notice in large and legible characters, of the fines and penalties hereinafter provided for the protection of such bridges, under the penalty of a sum not exceeding twenty dollars.*

"Section 64. *Provided*, that if any such bridge shall be built across the line of townships, the supervisors of the said townships shall be liable as aforesaid, to put up and maintain such notices only at or near the end of the bridge within their respective townships."

"Section 70. If any person shall wilfully ride, drive or lead, or cause another person to ride, drive or lead any horse or other beast of burden, faster than a walk when crossing any wooden bridge having an arch of the length or span of forty-five feet or upwards, such persons shall, for every such offence, forfeit and pay a sum not less than five dollars nor more than thirty dollars: *provided nevertheless*, that notice of the provisions of this section be set up in

[7] Union Canal Company *v.* Pinegrove Township, 6 W. & S. 560.

* Section 69 provides that any person who shall wilfully destroy, deface or injure any notice put up at any public bridge as aforesaid, shall for every such offence forfeit and pay a sum not less than five dollars nor more than fifteen dollars.

the manner hereinbefore required. [See section 63, above.]

"Section 71. If any person shall wilfully drive or cause to be driven, any horned cattle faster than a walk, when crossing any such bridge, such person shall, for every such offence, forfeit and pay a sum not less than five dollars nor more than thirty dollars: *provided nevertheless*, that notice hereof be set up in the manner hereinbefore required. [See section 63, above.]

"Section 72. If any person shall carry fire over such bridge, except in a lantern or in some vessel in which it will be fully secured, such person shall forfeit and pay the sum of five dollars: *provided nevertheless*, that notice of the provisions of this section be set up in the manner hereinbefore required. [See section 63, above.]

"Section 73. *Provided also*, that nothing in this Act shall be so construed as to impair, in any wise, any right or privilege which any company, incorporated by any Act of Assembly of the commonwealth, may have to make regulations for the preservation of any bridge erected by such company, or which may be under their care.

"Section 74. If any person shall wilfully set fire to any wooden bridge within this commonwealth, with intent to destroy the same, or shall be accessary thereto before the fact, such person shall, for every such offence, be liable to indictment, and to the punishment provided by law in cases of arson, and also shall forfeit and pay a sum not more than two thousand dollars, at the discretion of the court having cognizance of such offence, for the use of the county, township or townships, corporations or persons aggrieved.

"Section 75. All fines and pecuniary penalties which may be incurred under any of the provisions of this Act, shall, unless it be otherwise especially provided, be recoverable in the name of the commonwealth, at the instance of any person who will sue therefor, in the same manner as debts of like amount are recoverable, with costs of suit, and one moiety thereof shall be paid to the person suing for and recovering the same, and the residue shall be paid into the treasury of the respective townships, for the use of the supervisors of the public roads."

A Supplement to the Act relating to roads, highways and bridges, passed on the 13th of April, 1843, directs, "that from and after the passage of this Act, it shall be the duty of the county commissioners of the several counties of this commonwealth, to repair all bridges erected by the county, and to pay the expenses of such repairs out of the county treasury in the usual manner, except the Counties of Bedford, Washington, Westmoreland, Tioga, Potter, Cambria, Somerset, Armstrong, Allegheny and Susquehanna."

Section 5 of "an Act relating to public roads in the counties therein named," passed February 24, 1845, directs "that from and after the passage of this Act, it shall be the duty of the county commissioners of Allegheny county, to repair all bridges erected by the said county, and to pay the expenses of such repairs out of the county treasury in the usual manner."

The following are the forms in use upon the application for a bridge:

*First*, the petition.

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace of the county of :

"The petition of the subscribers, inhabitants of the township [or townships] of in said county, respectfully represents:

"That a bridge is much wanted over creek at a place where the public highway from to crosses the same in the township of in the said county, and that the erection of such bridge will require more expense than it is reasonable that the said township [or townships] should bear.

"Your petitioners therefore pray the court to appoint proper persons to view the premises, and to take such order on the subject as is required and directed by the Act of Assembly in such case made and provided. And they will ever pray, &c."

The order of the court whereon is as follows:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"Upon the petition of sundry inhabitants of the township [or townships] of in the said county, setting forth that a bridge is much wanted over creek at the place where the public highway from to crosses the same, in the township of in the said county, and that the erection of such bridge will require more expense than it is reasonable that the said township [or townships] should bear, and praying the court to appoint proper persons to view the premises, and to take such order on the subject as is required and directed by the Act of Assembly in such case made and provided: whereupon the court on due consideration had of the premises, do order and appoint G. H., I. J., K. L., M. N., O. P. and Q. R., who, after being respectively

sworn or affirmed to perform the duties of their appointment with impartiality and fidelity, are to view the place proposed for the said bridge, and if they or any five of them view the same, and any four of the actual viewers agree that there is occasion for such a bridge, and that the erection of the said bridge would require more expense than it would be reasonable that the said township [or townships] should bear, make report accordingly; and the said viewers are further authorized to examine the route of the road crossing the creek over which the said bridge is prayed for, and if in their opinion a change or variation in the bed of the road would be an improvement and saving of expense in the erection of such bridge, they are to make report thereof and cause such variation as aforesaid, to be accurately surveyed, and a map or plot thereof to be made, which shall accompany the said report; the report [or reports] aforesaid to be made to the next Court of Quarter Sessions to be held for the said county of , and in which report they shall state that they have been sworn or affirmed according to law.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The report in favour of the bridge is thus drawn up:

"To the Honourable the Judges within named:

"We the subscribers appointed by the court, to view the place proposed for a bridge in the within order mentioned, after being respectively sworn or affirmed according to law, do report that in our opinion a bridge over creek at the place where the public highway from to crosses the same, is necessary, and that the erection of such a

bridge would be attended with more expense than it is reasonable that the said township [or townships] should bear. Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

When the viewers are of opinion that a change in the route of the road would be desirable, they report as in the above form to the end of the words "the said township should bear," and then proceed as follows:

"And we further report to the court, that after proper examination we are of opinion that a change or variation in the bed and route of the road would be an improvement and saving of expense in the erection of the said bridge, and therefore report that the route of the said road should be changed in the following manner [state particularly the proposed change, and annex a map or plot of it.] Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

An unfavourable report should run as follows:

"To the Honourable the Judges within named:

"We the subscribers appointed by the court to view the place proposed for the bridge in the within order mentioned, after being respectively sworn or affirmed according to law, do report, that in our opinion a bridge over creek at the place where the public highway from to crosses the same, is unnecessary [or, would not be attended with more expense than it is reasonable that the said township [or townships] should bear.] Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

The Court of Quarter Sessions and the Grand Jury

of the county having considered a report in favour of a bridge, and concurred with the viewers as to its necessity, and as to its being attended with more expense in the erection than the township [or townships] in which it would be situated, could reasonably bear, the Court of Quarter Sessions then sends the following certificate to the commissioner of the county.

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"A petition having been presented to this court for the appointment of persons to view and report, according to law, on the erection of a bridge prayed for in the said petition, the court appointed proper persons for that purpose, who made report that after examining the premises, they are of opinion that a bridge is necessary over creek at the place where the public highway from to crosses the said creek in the township [or townships] of in the said county, and that the erection of such bridge would be attended with more expense than it is reasonable that the said township [or townships] should bear, and the said report having been submitted at sessions to the said court and the grand jury of the county, they are, upon due consideration, respectively of opinion that the said bridge is necessary, and that the erection of the same would be attended with more expense than the township [or townships] should bear, and do therefore concur in the said report, and the same is ordered to be entered of record, and a copy of this record furnished to the commis-

sioners of county, by the Clerk of the Court of Quarter Sessions thereof.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The bridge having been built by the county commissioners, it becomes their duty to present a petition to the Court of Quarter Sessions, praying for the appointment of persons to inspect it, which petition is drawn up as follows:

"To the Honourable the Judges of the Court of Quarter Sessions of the Peace of the county of :

"The petition of the undersigned, the commissioners of the said county, respectfully showeth,

"That it having appeared to the court, the grand jury and the commissioners of the said county, that a bridge over creek at the place where the public highway from to crosses the said creek in the township [or townships] of in the said county, was necessary, and that it would be too expensive for the said township [or townships] to erect, the same having been entered of record, your petitioners procured an estimate to be made, as nearly as might be, of the expense of the same, amounting to the sum of dollars, and did proceed to have such bridge erected, by entering into a contract with L. S. of the county of [or, *as the case may have been*] for the building of the same; that the said bridge is now completed agreeably to the said contract [or *otherwise*]: Wherefore they pray the court to appoint six fit persons to inspect the said bridge and the workmanship thereof, agreeably to the Act of Assembly, and make report to the next Court of Quarter Sessions according to law."

[*Signed by the Commissioners.*]

Whereupon the court make the following order:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"Upon the petition of and , commissioners of the said county, stating that it having appeared to the court, to the grand jury and the commissioners of the said county, that a bridge over creek, at the place where the public highway from to crosses the said creek in the township [or townships] of in the said county, was necessary, and that it would be too expensive for the said township [or townships] to erect, the same having been entered on record, the petitioners procured an estimate, as nearly as might be, of the expense of the same, amounting to the sum of dollars, and did proceed to have such bridge erected by entering into a contract with L. S. [or otherwise, according to the petition of the county commissioners] for the building of the same; that the said bridge is now completed, agreeably to the said contract [or otherwise], and therefore praying the court to appoint six fit persons to inspect the said bridge and the workmanship thereof, agreeably to the Act of Assembly, and to make report to the next Court of Quarter Sessions, according to law: Whereupon the court appoint G. H., I. J., K. L., M. N., O. P. and Q. R., who, after being respectively sworn or affirmed according to law, are to inspect the said bridge and the workmanship thereof, and make report accordingly to the next court according to law. In which report they shall

state that they have been sworn or affirmed according to law.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The report of the inspectors, when favourable, will run thus:

"To the Honourable the Judges within named:

"We the subscribers appointed by the court to inspect a certain bridge in the within order mentioned, having been respectively sworn or affirmed according to law, do report that we have viewed and carefully examined the same, and are of opinion that it is completed in a substantial and workmanlike manner, according to the contract entered into with the commissioners of the said county [or otherwise, as the facts may have been.] Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

The following is the form in which an unfavourable report should be drawn up:

"To the Honourable the Judges within named:

"We the subscribers appointed by the court to inspect a certain bridge in the within order mentioned, having been respectively sworn or affirmed according to law, do report that we have viewed and carefully examined the same, and are of opinion that it is not completed in a substantial and workmanlike manner, according to the contract entered into with the commissioners of the said county [or otherwise, as the case may have been], and that in their judgment the sum of dollars should be deducted from the sum stipulated in the said contract, or (if the bridge has been erected by the county commissioners or under their superintendence) that the said bridge

is deficient in the following respects, namely, , and that the same has occurred through the default [or neglect, or official misconduct] of the said commissioners [or of one [or two] of the said commissioners], and that in their judgment the said bridge is worth only the sum of dollars. Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

A report in favour of a bridge would be thus confirmed:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"The persons appointed by order of this court of sessions last past, to view the bridge lately erected over creek at the place where the public highway from to crosses the same in the township [or townships] of in the said county, by L. S. of , under contract with the commissioners of the said county [or, as the case may have been], after being respectively sworn or affirmed according to law, do report that they have viewed and carefully examined the same, and are of opinion that it is completed in a substantial and workmanlike manner, according to contract entered into with the commissioners of the said county for that purpose [or, as the case may have been], which report being read and considered, is approved of and confirmed by the court.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The following are the forms in use, where the pro-

posed bridge would be over a creek forming the boundary between two counties:

"To the Honourable the Judges of the Court of Quarter Sessions of the county of :

"The petition of the subscribers, inhabitants of the counties of and , respectfully showeth,

"That a bridge is much wanted over creek, being the line of the said counties, at the place where the public highway from to crosses the same in the township of in the county of and in the township of in the county of , and that the erection of such bridge will require more expense than it is reasonable that the said townships should bear: wherefore, your petitioners pray the court to appoint proper persons to view the premises, and take such order on the subject as is required and directed by the Acts of Assembly in such case made and provided. And they will ever pray, &c."

A copy of the foregoing petition should be presented to the Court of Quarter Sessions of each of the two counties.

The court makes the following order upon the petition:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"Upon the petition of sundry inhabitants of the counties of and , setting forth that a bridge is much wanted over creek, being the line of the said counties, at the place where the public highway from to crosses the same, in the township of in county and in the township of in county, and that the erec-

tion of such bridge will require more expense than it is reasonable that the said townships should bear, and praying the court to appoint proper persons to view the premises and take such order on the subject as is required and directed by the Act of Assembly in such case made and provided: whereupon the court, on due consideration had of the premises, do order and appoint, on behalf of the said county of , G. H., I. J. and K. L., who, after being respectively sworn or affirmed to perform the duties of their appointment with impartiality and fidelity, together with three persons similarly appointed by the Court of Quarter Sessions of the county of , are to view the place proposed for the said bridge; and if they or any five of them view the same, and any four of the actual viewers agree, they shall make reports to the respective courts whether there is occasion for such bridge, and whether the erection of the said bridge would require more expense than it would be reasonable that the said townships should bear; one of which said reports to be made to the next Court of Quarter Sessions to be held for the county of , and the other of the said reports to the next Court of Quarter Sessions to be held for the county of . In which reports they shall state that they have been sworn or affirmed according to law.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The report of the viewers will run thus; a copy being presented to each of the courts:

"To the Honourable the Judges within named:

"We the subscribers appointed by the within order of court, and a similar order of the Court of

Quarter Sessions of the county of , to view the place proposed for the bridge in the within order mentioned, after being respectively sworn or affirmed according to law, do report that in our opinion a bridge over creek, at the place where the public highway from to crosses the same, is necessary, and that the erection of such a bridge would be attended with more expense than it is reasonable that the said township [or townships] should bear. Witness our hands and seals the day of in the year of our Lord one thousand eight hundred and ."

The bridge having been approved of by the Courts of Quarter Sessions and the grand juries of both counties, each of the Courts of Quarter Sessions issues a certificate thereon to the commissioners of its respective county in the following form:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"A petition having been presented to this court for the appointment of persons to view and report, according to law, on the erection of a bridge prayed for in the said petition, the court appointed proper persons for that purpose, who, with three other persons appointed for that purpose by the Court of Quarter Sessions of the county of , made report that after examining the premises, they are of opinion that a bridge is necessary over creek at the place where the public highway from to crosses the same in the township of in county and in the township of in county, and that the erection of such bridge would

be attended with more expense than it is reasonable that the said townships should bear; and the said report having been submitted at sessions to our Court of Quarter Sessions for the county of , and to the grand jury of the said county, and also at sessions to the Court of Quarter Sessions for the county of and the grand jury thereof, our said Court of Quarter Sessions for the county of and the grand jury thereof are, upon due consideration, respectively of opinion that the aforesaid bridge is necessary, and that the erection of the same would be attended with more expense than the townships should bear, and do therefore concur in the said report, and the same is ordered to be entered of record and a copy of the record furnished to the commissioners of by the Clerk of the Court of Quarter Sessions thereof.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The bridge having been erected, the commissioners of both counties present a petition to the Court of Quarter Sessions of each county for the appointment of viewers to inspect the bridge, as follows:

"To the Honourable the Judges of the Court of Quarter Sessions of the county of :

"The petition of the commissioners of the counties of and respectfully represents,

"That it having appeared to the court, grand jury and the commissioners of the said counties respectively, that a bridge over creek, being the line of the said counties, at the place where the public highway from to crosses the same in the township of in the county of and the township of in the county of , was neces-

sary, and that it would be too expensive for the said townships to erect; the same having been entered on record, your petitioners procured an estimate to be made, as nearly as might be, of the expense of the same, amounting to the sum of , and did proceed to have the same erected by entering into a contract with L. S. of [or, as the case may have been] for the building of the same; that the said bridge is now completed agreeably to the said contract [or otherwise]. Wherefore your petitioners pray the court to appoint three fit persons on behalf of county aforesaid, to inspect the said bridge and the workmanship thereof, agreeably to the Act of Assembly, and make report to the next Court of Quarter Sessions according to law.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

Upon which the court issues the following order for a view:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"Upon the petition of the commissioners of the counties of and , stating that it having appeared to the court, grand jury and commissioners of the said counties respectively, that a bridge over creek, being the line of the said counties, at the place where the public highway from to crosses the same in the township of in the county of and in the township of in the county of , was necessary, and that it would be too expensive for the said townships to erect; the same having been entered of record, the said peti-

tioners procured an estimate, as nearly as might be, of the expense of the same, amounting to the sum of , and did proceed to have the said bridge erected by entering into a contract with L. S. of [or otherwise, as the case may have been] for the building of the same; that the said bridge is now completed agreeably to the said contract [or otherwise], and therefore praying the court to appoint three fit persons on behalf of the county of aforesaid, to inspect the said bridge and the workmanship thereof, agreeably to the Act of Assembly, and make report to the next Court of Quarter Sessions according to law: whereupon the court appoint on behalf of the said county, G. H., I. J. and K. L., who, after being respectively sworn or affirmed according to law, are, together with three persons similarly appointed by the Court of Quarter Sessions of county, to inspect the said bridge and the workmanship thereof, and make duplicate reports accordingly, one whereof is to be made to the next Court of Quarter Sessions for the county of , and the other to the next Court of Quarter Sessions for the county of . In which reports they shall state that they have been respectively sworn or affirmed according to law.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

The report, if in favour of the bridge, will run as follows, a copy being presented to each of the Courts of Quarter Sessions.

"To the Honourable the Judges within named:

"We the subscribers appointed by the within order of court, and a similar order from the Court of Quarter Sessions of the county of , to inspect

a certain bridge in the within order mentioned, having been respectively sworn or affirmed according to law, do report that we have viewed and carefully examined the same, and are of opinion that it is completed in a substantial and workmanlike manner, according to the contract entered into with the commissioners of the counties of and for that purpose [or otherwise, as the case may have been]. Witness our hands and seals this day of in the year of our Lord one thousand eight hundred and ."

An unfavourable report will resemble the above to the end of the words "are of opinion that it is," and will conclude like the unfavourable report in the case of a county bridge, *ante*.

A favourable report will be thus confirmed:

"At a Court of Quarter Sessions of the Peace of the county of held at on the day of in the year of our Lord one thousand eight hundred and :

"The persons appointed by an order of this court of sessions last past, and a similar order of the Court of Quarter Sessions of the county of , to view the bridge lately erected over creek, being the line of the said counties at the place where the public highway from to crosses the same in the township of in the county of and the township of in the county of , by L. S. of , under contract with the commissioners of the said counties [or otherwise, as the case may have been], after being respectively sworn or affirmed according to law, do report that they have viewed and carefully examined the same, and are of opinion that it is completed in a substantial and workmanlike

manner, according to contract [or otherwise], which report being read and considered (the Court of Quarter Sessions of the county of concurring), is approved of and confirmed by this court.

"By the court.

[*Seal.*] Y. Z., *Clerk.*"

## CHAPTER VI.

### OF THE REMOVAL OF PROCEEDINGS IN ROAD CASES TO THE SUPREME COURT BY CERTIORARI.

The Supreme Court of Pennsylvania possesses a supervision over the proceedings of the Courts of Quarter Sessions relating to roads, which is exercised by means of the writ of certiorari issued from the Supreme Court directed to the Court of Quarter Sessions, and commanding the latter court to certify and send before the Supreme Court their proceedings in relation to the road in question.

A certiorari to the Court of Quarter Sessions to remove road cases, lies without any special allowance or cause shown, in which the court may affirm the proceedings or remit them for further proceedings. And the same principle applies to a proceeding in that court for laying out streets and squares in a proposed city district.[1]

A certiorari to remove a road must set out its beginning and ending, otherwise it will be quashed.[2]

The party who removes a road from the sessions, must procure the record to be returned, or a rule will be made that the sessions shall proceed notwithstanding the *certiorari*.[3]

[1] In the Matter of the district of the City of Pittsburgh, 2 W. & S. 320.

[2] Road in East and West Nantmill townships, 4 Yeates 433.

[3] Oyster's and Emigh's Road, 1 Yeates 3.

A *special allocatur* is not necessary in the case of a *certiorari* to remove proceedings in the Quarter Sessions, on the opening of a road in the county of Philadelphia, notwithstanding the provisions of the Act of June 13, 1836, relating to roads, highways and bridges.[4]

On a *certiorari* to remove proceedings in the case of a road, no point can be made in the Supreme Court, which is not exclusively apparent in the proceeding of the Quarter Sessions, removed.[5]

The Supreme Court will not on a certiorari to the Court of Quarter Sessions to remove the proceedings in a road case, enter into the merits or determine facts or depositions,[6] or hear parol evidence,[7] but will decide upon the face of the proceedings.[8]

But it has not been the practice of the Supreme Court to confine itself strictly to the record of the proceedings of the Quarter Sessions in matters relating to roads.[9]

The Supreme Court will hear evidence, in the case of a certiorari to move proceedings in a road case, to show that all the viewers attended the view, if the record does not state the contrary, and no exception was taken in the court below to the non-attendance of the viewers.[10]

The Supreme Court will presume that the place where the damage arising from opening a road happened, was within the jurisdiction of the Court of

[4] Road from Thomas' Creek, 3 Wharton 11.
[5] Philadelphia & Trenton Railroad, 6 Wharton 25.
[6] Case of Spring Garden Street, 4 Rawle 192.
[7] Schuylkill Falls' Road, 2 Binney 250.
[8] Road in Aston Township, 4 Yeates 372.
[9] [10] Case of the Baltimore Turnpike, 5 Binney 481.

Quarter Sessions, unless the contrary appears from the record.[11]

The Court of Quarter Sessions having ordered that notice should be given to the county commissioners of the meeting of the viewers, and it appearing that two of them attended the view, the Supreme Court upon exception to the proceedings, held that it must be presumed that the notice was given.[12]

The last thing done by the Court of Quarter Sessions having been the quashing of a report of rereviewers (which was in favour of the road) for uncertainty, the Supreme Court held that the proceedings were not at an end, and quashed a certiorari to remove them.[13]

Where an exception to the proceedings in a road case was, that the breadth of the road was not fixed by the judgment of the sessions, and no order for opening the road had been taken out below, the Supreme Court remanded the proceedings, to give the Court of Quarter Sessions an opportunity to complete their order by fixing the breadth of the road.[14]

Depositions taken and filed in the Court of Quarter Sessions and sent up with the record on *certiorari*, may be read in the Supreme Court in support of an exception founded on matter of fact.[15]

Notwithstanding an Act of Assembly says that the surveys and regulations of a street shall remain unalterable, this does not deprive the Supreme Court of

[11] Case of the Baltimore Turnpike, 5 Binney 481.
[12] Schuylkill Falls' Road, 2 Binney 250.
[13] Case of the Road from Bough Street, 2 S. & R. 419.
[14] Case of Shamokin Road, 5 Binney 36.
[15] Case of Bryson's Road, 2 Penn. Rep. 207.

its jurisdiction to review the proceedings on certiorari.[16]

On certiorari to the proceedings in the opening of a public road, so much of the order as related to the breadth of the road, was reversed, and the residue confirmed, and the proceedings were remitted with directions to fix such a breadth as would do the least injury to private property.[17]

[16] The Commissioners of Philadelphia county *v.* The Commissioners of Spring Garden, 6 S. & R. 524.

[17] Road in Whitemarsh, 5 Barr 101.

## CHAPTER VII.

### OF SUPERVISORS OF ROADS.

The electors of every township in the state (except those in the Counties of Bradford, Erie, Franklin, Luzerne, Susquehanna, Tioga, Venango, Warren and Wayne) annually elect two supervisors of roads. In the nine counties mentioned above, three supervisors are chosen by the electors, one annually, who hold their offices for three years. [See Act of April 15, 1834, "relating to counties and townships and county and township officers," section 71, and the Supplement thereto, passed February 23, 1835, section 8].

The following sections of the Act of April 15, 1834, thus define some of their duties, responsibilities and rights.

"Section 90. The supervisors of each township elected or appointed in pursuance of this Act, shall perform all the duties imposed by law on supervisors of the public roads or highways, and be subject to the same responsibilities, and shall be by virtue of their office, overseers of the poor of the township where the poor are a township charge. And it shall be the duty of the said supervisors to keep fair and clear accounts in a book to be provided for the purpose, of all moneys received by them or either of them, and by them or either of them expended on behalf of the township, and such accounts verified by oath

or affirmation, shall be exhibited to the township auditors at the annual settlement of the accounts of such supervisors.

"Section 91. If any supervisor shall after ten days' notice, neglect or refuse to produce his accounts before the auditors, or to pay over to his successors in office the balance of public money in his hands, or to deliver to such successors the books of account as aforesaid, it shall be lawful for the auditors by warrant under their hands and seals directed to the sheriff or any constable of the county, setting forth particularly the cause of such commitment, to commit such delinquent to the county jail until he shall comply with the requisitions of the law, or be otherwise legally discharged.

"Section 92. If any supervisor shall neglect or refuse to perform any duty required of him by law, he shall pay a sum not less than four dollars nor exceeding fifty dollars, to be recovered in a summary way by action of debt in the name of the commonwealth, before any justice of the peace of the county, to be applied towards repairing the highways of the same township: *provided*, that such supervisors may appeal from the judgment of such justice to the next Court of Quarter Sessions, who shall take such order thereon as to them shall appear just and reasonable, and the same shall be final and conclusive.

"Section 93. Every supervisor shall be allowed in the settlement of his accounts, a sum not exceeding one dollar for each day he shall be necessarily employed in discharging the duties of his office."

Section 9 of the Act of February 28, 1835, repeals so much of the above recited 19th section as requires the supervisors to discharge the duties of overseers

of the poor, except in the nine counties above mentioned (Erie, &c.).

Section 96 of the Act of April 15, 1834, requires each township treasurer to pay all moneys received by him from taxes or otherwise, on orders drawn by the supervisors of the township.

Section 95 of the same Act requires the township treasurer to give bond with sureties, for the faithful discharge of his duties, to the satisfaction of the supervisors of the said township.

The Act of June 15, 1834, makes the following provisions for raising funds to lay out, open and repair the roads of the township.

"Section 25. It shall be lawful for the supervisors of any township to lay a rate or assessment not exceeding one cent in the dollar, upon real and personal estate, offices, trades and occupations, for the purpose of laying out, opening, making, amending or repairing of roads and highways and for the making and repairing of bridges, and for such other purposes as may be authorized by law."

"Section 28. The supervisors and overseers respectively laying such rate or assessment, shall take to their assistance the township assessor for the time being, whose duty it shall be to furnish a correct copy of the last adjusted valuation in the township as aforesaid, and to give his aid in making such assessment.

"Section 29. The supervisors and overseers of the poor of every township shall cause the rates or assessments by them respectively laid, to be entered in books to be prepared for the purpose, which shall be signed by them respectively and shall be deposited with the town clerk, if there be one in the township,

but if not it shall remain with the supervisors or overseers respectively; and such town clerk, supervisors or overseers, as the case may be, shall permit any inhabitant or other person charged with township rates and levies, to inspect the same at all seasonable times, without any fee or reward, and shall give copies of the same on demand, being paid at the rate of ten cents for every twenty-four names.

"Section 30. If any supervisor, overseer or town clerk, having charge of such books, shall refuse to permit any inhabitant or other person charged with township rates or levies, to inspect the same, or shall refuse to give copies as aforesaid, he shall forfeit three dollars to the party grieved, to be recovered as debts of a like amount are recoverable.

"Section 31. The supervisors and overseers of every township shall annually, at a meeting to be convened for the purpose, appoint some suitable inhabitant of the township to be collector of the township rates and levies.

"Section 32. Every person appointed collector of township rates and levies, shall give a bond with surety, or a bond with mortgage of real estate, to the satisfaction of the supervisors and overseers of the poor of the respective townships.

"Section 33. The supervisors and overseers of the poor of every township, shall cause fair duplicates to be made of the rates in assessments by them respectively laid, which shall be signed by them respectively, and shall issue their warrant with such duplicates to the collector of such rates and levies, therein authorizing and requiring him to demand and receive from every person in such duplicate named, the sum wherewith such person stands charged.

"Section 34. *Provided,* that before issuing the duplicate and warrant for the collection of road taxes, it shall be the duty of the supervisors of every township to give notice to all persons rated for such taxes, by advertisements or otherwise, to attend at such times and places as such supervisors may direct, so as to give such persons full opportunity to work out their respective taxes."

"Section 39. If in any township there shall not be a treasurer elected or appointed, it shall be the duty of the supervisors and overseers of the poor of the township, either by themselves or by a proper person duly authorized by them respectively, to collect the township rates and levies by them respectively laid: *provided,* that in such case the supervisors and overseers shall, respectively, be accountable for the faithful collection thereof, by the person so authorized by them respectively.

"Section 40. In every such case in which a treasurer shall not be elected or appointed in any township, it shall be lawful for the supervisors and overseers respectively, to pay out as occasion may require, according to their several duties, the moneys by them respectively received or collected by virtue of their offices."

The following sections of the same Act regulate the proceedings for the recovery of township rates and levies, by distress and sale, and the appeals that may thereon be taken by any person aggrieved:

"Section 35. If any person shall neglect or refuse to make payment of the sum charged to him for township rates and levies, it shall be lawful for the collector thereof, having first obtained a warrant under the hand and seal of any justice of the peace

of the county, to levy the same by distress and sale of the goods and chattels of such delinquent, giving ten days' public notice of such sale by written or printed advertisements; [the residue of the section provides for the imprisonment of the debtor, if sufficient distress cannot be found, and has been repealed by the Act abolishing imprisonment for debt].

"Section 36. *Provided*, that it shall be lawful for any person aggrieved by such rate or assessment, to apply by petition to the next Court of Quarter Sessions of the respective county, who shall have power to take such order thereon as to them shall be thought expedient, and the same shall conclude and bind all parties.

"Section 37. *And provided also*, that if any person aggrieved by such rate or assessment, shall apply to a judge of such court and give bond with surety to the satisfaction of such judge, it shall be lawful for such judge to make an order in writing, which shall stay all proceedings for the collection of the sum with which such person stands charged until such appeal be determined.

"Section 38. The bond to be given in such case by the appellant shall be taken in the name of the township, in an amount equal to the sum with which such person stands charged, with condition for the payment of such sum as by the determination of the next Court of Quarter Sessions of the respective county, shall appear to be payable by him."

The Act of June 13, 1836, makes the following provisions as to the duties of the supervisors in making and repairing roads:

"Section 27. The supervisors aforesaid shall have power, and they are hereby enjoined and required,

at the expense of the respective townships, to purchase wood, timber and all other materials necessary for the purpose of making, maintaining and repairing the public roads or highways, and to employ, oversee and direct a sufficient number of labourers to execute promptly and effectually the provisions of the law, and the orders and decrees of the courts having jurisdiction concerning such roads.

"Section 28. The supervisors aforesaid shall severally have full power and authority within their respective townships, to enter upon any land or enclosure lying near to the said roads, and to dig, gather and carry upon said roads any stone, sand or gravel found on the same, which they may think necessary for the purpose of making, maintaining or repairing the said roads, when the same cannot be conveniently obtained by contract at reasonable prices, doing no unnecessary damage to the owners of the said lands, and repairing any breaches of fences which they shall make.

"Section 29. Whenever the supervisors and the owners of any materials which may be wanted for making, maintaining or repairing the roads aforesaid, cannot agree upon the price to be paid therefor, the value of such materials shall be estimated by any two of such three persons as may be agreed upon by such supervisors and owners.

"Section 30. If the supervisors and owners cannot agree upon any persons to estimate the value thereof, the owner may apply to a justice of the peace residing as near the place where such materials were taken as may be, and thereupon such justice shall appoint three judicious persons, one on the nomination of the supervisors, one other on the nomination of the

owner of such materials, and the third upon his own suggestion, and the decision of the persons so appointed, or any two of them, shall be entered upon the docket of such justice and shall be final; *provided*, that if either party shall, after due notice, refuse or neglect to nominate as aforesaid, it shall be the duty of the justice to appoint one other person in his stead.

"Section 31. It shall be the duty of the supervisors aforesaid, in making and repairing the public roads, to make and maintain within their respective townships, sufficient causeways of stone or timber, on marshy or swampy grounds, and also to make and maintain sufficient bridges over all small creeks and rivulets and deep gullies, where the same shall be necessary for the ease and safety of travellers.

"Section 32. The supervisors aforesaid shall also have power and authority as aforesaid to enter upon any such lands or enclosures, and cut, open, maintain and repair all such drains or ditches through the same, as they shall judge necessary to carry the water from the said roads.

"Section 33. In cases where any public road has been or shall be laid on the line of two townships, if the supervisors of either of the said townships shall neglect or refuse to join with the supervisors of the other township in opening or repairing such road, the supervisors of the other township are hereby directed and required to open, amend and repair the said road, and the supervisors so neglecting or refusing, shall be liable to the same penalties as if they had neglected or refused to open or repair any public road situate wholly within their respective township."

The two following sections of the same Act relate to the erection of index boards upon public roads:

"Section 61. The supervisors aforesaid shall cause posts to be erected at the intersection of all public roads within their respective townships (when trees are not convenient) with boards firmly fixed thereon, and index hands pointing to the direction of such roads, on which boards shall be inscribed in large and legible characters, the name of the town, village or place to which such roads may lead, and the distance thereto computed in miles.

"Section 62. If any supervisor shall, after ten days' personal notice, neglect or refuse to put up, or keep in complete repair, index boards as aforesaid, such supervisor shall, for every such offence, forfeit and pay a sum not exceeding ten dollars."

And the following section inflicts a penalty for the destruction or injury of such index boards:

"Section 69. If any person shall wilfully destroy, deface or injure any guide post or index board erected at or near any public road, such person shall, for every such offence, forfeit and pay a sum not less than five dollars, nor more than fifteen dollars."

The following sections of the same Act relate to attempts at extortion on the part of any person working upon the public roads, and to any connivance of the supervisors therein.

"Section 65. If any person working upon any road or highway, or if any one in company with such person, shall ask money or reward, or by any means whatever shall extort, or endeavour to extort any money, drink or other thing, of or from any person travelling upon or near such road or highway, the person so

offending shall, for every such offence, forfeit and pay a sum not exceeding five dollars.

"Section 66. If any supervisor shall connive at any person so asking, demanding or contriving to extort money, drink or any other thing, from any person travelling as aforesaid, such supervisor shall, for every such offence, forfeit and pay a sum not exceeding ten dollars."

The following decisions have been made respecting supervisors:

The supervisors of roads in a township, although not in strictness a corporation, yet for certain purposes, are *quasi* a corporation; so that an order in favour of the supervisors, would enable their successors to sustain an action in their own names for the use of the township.[1]

An action cannot be maintained by the supervisors of roads, after they have gone out of office, against the county treasurer, upon an order drawn on him by the commissioners in favour of the supervisors or their successors in office.[2] *It seems*, however, if the supervisors had worked upon the roads to the amount of the order, or had paid others for their labour, they might have acquired such an interest in the order as would have enabled them to sustain a suit for their own use.[3]

When the treasurer has received money due for road taxes, he is bound to pay it to the supervisors, and has no right to make payment in county orders.[4]

Without an order of the Quarter Sessions, supervisors of the highways have no authority to open a temporary way for the public, in a case of sudden

[1] [2] [3] [4] Willard *v.* Parke, 1 Rawle 448.

necessity, through private property, or to correct errors in the opening of an old one.[5]

An indictment against public officers for not repairing roads or streets, must conclude, "to the common nuisance of the citizens of the Commonwealth of Pennsylvania."[6]

On the 7th of May, 1844, an Act of Assembly was passed "relative to roads and bridges in the Counties of Crawford, Clearfield and Greene."

The *first section* provides for the election in 1845, of three persons in each township in these counties, to be styled supervisors of roads and bridges.

The *second section* provides for their classification, one to serve three years, one two years, and one one year; annually thereafter, one supervisor to be elected to serve three years.

The *third and fourth sections* relate to the assessment of road taxes by the supervisors.

The *fifth section* makes each school district a road district, in which one person is annually to be elected a pathmaster, and defines his duties.

The *sixth section* regulates the collection of road taxes.

The *seventh section* prescribes the duties of supervisors, in relation to roads and bridges, in their respective townships.

The *eighth section* orders returns to be made of unseated lands on which the road tax is unpaid.

The *ninth section* relates to the collection of the road taxes.

[5] Holden *v.* Cole and others, 1 Barr 303.

[6] Graffius *v.* The Commonwealth, 3 Penn. Rep. 502.

The *tenth section* regulates the settlement of the supervisors' accounts.

The *eleventh section* provides for their pay.

The *twelfth section* directs the road-masters to have the road tax worked out in their respective districts.

The *thirteenth section* relates to exoneration from road tax.

The *fourteenth section* provides a remedy for any persons aggrieved by the supervisors in laying out new roads.

The *fifteenth section* repeals existing laws, so far as they are supplied or altered by the Act.

Section 7 of the Act passed February 24, 1845, "relative to certain roads in certain counties therein named," directs the supervisors in every township in the County of Crawford, or a majority of them, at their first meeting, as provided for in the 2d section of the above mentioned Act of May 7, 1844, "to divide their respective townships into as many road districts as they deem necessary, and at the same time and place appoint a competent person for each road district, to serve as road-master, who shall perform all the duties enjoined on road-masters by the aforesaid Act."

## CHAPTER VIII.

### OF STREETS AND ROADS IN CITIES AND BOROUGHS.

An Act of Assembly appointed certain commissioners to open certain streets, &c., in the borough of Norristown, and directed that they should make report to the Court of Quarter Sessions with a plan of the streets, and on its approval by the court that the plan should be recorded, and a certified copy of it be evidence. The commissioners proceeded to execute the power, and made report to the Quarter Sessions, which was approved, but the report was not recorded and was lost. An action of trespass was brought by an owner of land against the street commissioner for opening a street through his close, and after the commencement of the suit an Act of Assembly was passed which directed that a certain plan in the clerk's office should be recorded and admitted in evidence in all cases in which the said report would be. This Act of Assembly was decided to be valid and admissible in evidence on the trial of the action.[1]

In trespass for breaking the plaintiff's close, the defendant justified under an order of the Court of Quarter Sessions, which directed the opening of a certain street through the plaintiff's land, the defendant being a commissioner of streets. *It was held,*

[1] Adle *v.* Sherwood, 3 Wharton 481.

that the order was a sufficient justification to the officer, and that the validity of the order could not be inquired into in that action.[2]

The charter of a borough authorized the town council to enact such by-laws as should be necessary for the good order, &c., of the borough, "particularly providing for the streets, alleys and highways therein," and also authorized them to appoint two persons to act as "street and road commissioners." *It was held*, that the said commissioners were not liable to an indictment for not repairing the streets, &c., without showing that the town council had authorized them to make such repairs.[3] It seems, that even if the town council had enacted a by-law for such purpose, the commissioners could not be *indicted* for such neglect.[4]

When public officers of a city corporation have located a highway and fixed the boundaries up to which the owners of property may build, and they have so built and enjoyed their property on both sides of it for more than twenty-one years, and the public highway has been used in that place for the same length of time, it must be considered as the true location, which cannot be disturbed to the prejudice of vested rights, by the subsequent acts or authority of the city corporation.[5]

An indictment against public officers for not repairing roads or streets, must conclude "to the common nuisance of the citizens of the Commonwealth of Pennsylvania."[6]

[2] Adle *v.* Sherwood, 3 Wharton 481.

[3] [4] Graffius *v.* The Commonwealth, 3 Penn. Rep. 502.

[5] Commonwealth *v.* Miltenberger, 7 Watts 450.

[6] Graffius *v.* The Commonwealth, 3 Penn. Rep. 502.

The Court of Quarter Sessions of the County of Northampton, has no jurisdiction over the laying out of roads within the limits of the borough of Easton.[7]

Under the Act of March 28, 1814, incorporating the borough of Mercer, the Quarter Sessions of the county, and not the borough officers, have power to lay out streets through the out-lots.[8]

Under the general road law, the Quarter Sessions has not jurisdiction to lay out and open streets and alleys on the site of streets and alleys laid out by the original proprietor of an incorporated borough in the plan of the town which have not been opened.[9]

Under the Act of March 31, 1836, in relation to Duquesne Way in the City of Pittsburgh, the report of the viewers appointed to assess damages, *must* be made to the *next* term. When, therefore, the report is not so made, the power under the order of the Court of Quarter Sessions drawn pursuant to the express directions of the Act, is expended, and must be renewed by a new order or the original order continued, upon application to the court, and if this be not pursued by the petitioner, he loses his remedy for damages.[10]

[7] Case of the Road in the Borough of Easton, 3 Rawle 195.
[8] Case of the Road from Erie Street, 14 S. & R. 447.
[9] *In re* Milford, 4 Barr 303. [10] *Ex parte* Teese, 4 Barr 69.

## CHAPTER IX.

### OF TURNPIKE AND OTHER ROADS MADE BY INCORPORATED COMPANIES.

The number of companies incorporated by the Legislature for the construction of turnpike* roads, is very great, amounting to several hundreds, and since the introduction of railroads, many companies have been incorporated for making roads of this kind. It would be quite beyond the limits of this work to enumerate these roads, much more, to give any of the provisions of their respective charters. The state was formerly in the habit of contributing to their construction by becoming a stockholder, and occasionally appropriations were made for their assistance. The embarrassed condition of our finances for some years past, has put a stop to both these usages.

* This word is now used in a way that denotes a complete ignorance of its original meaning. Roads were called turnpike roads which had gates erected on them at the points where toll was payable, which gates were revolving or turning and provided with a pike to stop those who would drive through without paying. Such gates probably never were in use in Pennsylvania; they certainly are not known at present. As roads made with broken stone were those usually made by the companies incorporated to make turnpike roads, the word turnpike or pike became applied to the bed of the road; and where stone is not used, roads made by companies are called clay-turnpikes or clay-pikes, in many parts of the state.

The Philadelphia & Lancaster Turnpike Road was the first made in Pennsylvania, and, it is believed, in the United States.

Under the Act of April 9, 1792, incorporating the Philadelphia & Lancaster Turnpike Company, it was decided by the Supreme Court that the company was not bound to make compensation for the soil, gravel or stone in the track of the road, nor to put up new fences where the road ran across a field: *otherwise*, where the fences was lengthwise along the road, or where improvements were destroyed.[1]

The report of this case contains a clear and full account of the road system of Pennsylvania, from the settlement of the province by Penn. The following extracts relate to the allowance of six per cent. for roads, made to every person purchasing land from the proprietaries, and, since the Revolution, from the state. This allowance was the reason for the decision in the above recited case, that payment was not to be made for land used by the company in the construction of their road.

"On the 11th of July, 1681, William Penn, the first proprietor of Pennsylvania, made and executed a certain instrument in writing entitled 'certain conditions or concessions agreed upon by William Penn, proprietor and governor of the province of Pennsylvania, and those who are the adventurers and purchasers in the same province.' No such great roads or highways, as in the said written instrument are mentioned, were first laid out and declared to be for highways, before the dividend of acres was laid out for the purchasers; but in lieu thereof, and with the assent of the said William Penn and the adventurers and purchasers, an allowance for such roads and highways, of six acres for every hundred acres over

[1] M'Clenachan *v.* Curwin, 3 Yeates 362.

and beyond the said quantity of every hundred acres, was from the first settlement of Pennsylvania made by the said William Penn, in all his grants of lands in Pennsylvania, for which said allowance no price or sum of money was ever charged or paid; and a like allowance for the like purpose hath ever since been made by the successors of the said William Penn, and by the State of Pennsylvania."

Chief Justice Shippen in his opinion, after giving a history of the allowance of six per cent. for roads, thus proceeds:

"We cannot, therefore, consider the Legislature's applying a certain portion of every man's land for the purposes of laying out public roads and highways, without compensation, as any infringement of the Constitution, such compensation having been originally made in each purchaser's particular grant."

The *proviso* in the 1st section of the Turnpike Act of March 17, 1806, that "toll shall not be demanded of any person when passing from one part of his farm to another along the road," extends to separate lots occupied as one farm.[2]

The Act of Assembly passed March 5, 1804, incorporating the Lancaster & Elizabethtown Turnpike Company, provided that on the petition of any person complaining of injury from the road, the Court of Quarter Sessions should appoint six persons to judge of the damage, and that the sum awarded by them, *if approved by the court*, should be paid by the company. The court had power, under these words, in case they disapproved of the report of the

[2] Commonwealth *v.* Carmalt, 4 Yeates 416.

six persons, to make a second appointment of persons to assess the damages.[3]

The 45th section of the Act of March 26, 1821, "for the improvement of the state," provided for a subscription on the part of the commonwealth, to the Anderson's Ferry, Waterford & New Haven Turnpike Company, and the 77th section of the Act provided that it should "be the duty of the president and managers of the several turnpike, road and bridge companies, to which roads or bridges the governor is by this Act authorized to subscribe for stock, before they or any of them shall draw out of the state treasury any part of the amount of the state's subscription, in this Act authorized to be subscribed, to settle the accounts of all such persons who may have heretofore performed work, labour or service, and to whom they are indebted for work done on contracts on any part of the said turnpike roads or bridges, and who hold the accounts in their own right, without having heretofore made a transfer thereof to any other person, and the amounts due and payable to them respectively, under their corporate seal, a duplicate of each certificate shall be transmitted by the treasurer of each company to the state treasurer, and the certificate given to each individual creditor for labour performed as aforesaid, shall be received by the state treasurer, and shall be paid by him to the holder thereof or to his order, and the amount so paid shall be deducted by the state treasurer from the appropriations made to such turnpike, road or bridge company."

[3] Redsecker *v.* The Falmouth Turnpike Company, Supreme Court, May, 1814, *MS.*

It has been decided that a mandamus will not be granted to compel a turnpike company to issue a certificate, as required by the above Act, to a person claiming a judgment against them, if they return that such judgment was not obtained for work, labour or service performed within the intent of the Act.[4] But a mandamus will be granted when they return that a judgment against them is appealed from; such return is not sufficient.[5]

The 77th section of the said Act embraces only those cases in which, by the other sections, there is no special appropriation of the money subscribed by the state to future expenditures. In such appropriations to future expenditures, the state treasurer is bound to pay the money subscribed to the company, and it is no objection to such payment, that a contractor objects to it who claims for work done before the passage of the Act.[6]

Under the 26th and 77th sections of the said Act, when the remaining six miles of the road were finished, the surplus of the fourteen thousand dollars subscribed by the state, that remained after paying the advances of the directors, is to be paid to persons who did the work before the passage of the Act, in preference to those who worked afterwards in finishing the six miles of the road.[7]

On the 4th of April, 1807, the following Act was passed, "imposing certain penalties upon persons de-

[4] [5] Commonwealth *v.* The Anderson's Ferry, &c., Turnpike Company, 7 S. & R. 6.

[6] Commonwealth *v.* The Hanover & Carlisle Turnpike Company, and the Commonwealth *v.* The State Treasurer, 9 S. & R. 59.

[7] Commonwealth *v.* The Berks & Dauphin Turnpike Road Company, 13 S. & R. 49.

frauding incorporated turnpike companies of their legal tolls, and also upon gate-keepers, for demanding or receiving in advance greater tolls than in proportion to the distance travelled."

"Section 1. From and after the first day of June next, no gate-keeper or toll-gatherer of any incorporated turnpike company within this commonwealth, shall, at any gate fixed or to be fixed on any such road, knowingly and wilfully take and receive from any person or persons passing through the same, a greater toll in advance than shall be in proportion to the distance such person or persons shall travel or pass on such road, between such gate and the gate next thereto, under the penalty of ten dollars for every such offence, to be recovered to and for the use of the party aggrieved; and if any person or persons shall defraud any such company, by travelling or using such road for a greater distance than in proportion to the toll he, she or they shall have so paid at any such gate, such person or persons so offending, shall forfeit and pay for the use of the proper company, for every such offence, the sum of ten dollars, to be recovered in like manner as other penalties in the proper Act of incorporation, upon due proof thereof, are recoverable."

The Acts of March 27, 1824, and April 10, 1826, relate to "turnpike companies in which the state holds stock," and are not here transcribed, as it is believed that the state has parted with all its stock in such companies.

The Act of March 19, 1828, "relative to the election of the officers of turnpike roads and bridge companies," is as follows:

"Whereas, it has been represented to the Legisla-

ture that impositions have been committed in the election of officers of various turnpike roads and bridge companies of this commonwealth, in consequence of the default of the persons conducting such elections, to produce the stock books, so as to ascertain who are by law rightfully entitled to vote:

"For remedy whereof—

"Section 1. From and after the passage of this Act, it shall be the duty of the treasurers or secretaries as the case may be, of the several turnpike and bridge companies incorporated within this commonwealth, to produce at the several places of holding the elections for officers of said companies, the stock books belonging to their companies respectively, and to open the said books during the continuance of such election to the inspection of any stockholder or stockholders demanding the same, and in case the said treasurers or secretaries, as the case may be, shall neglect to produce the said stock books belonging to their companies respectively, at the place of holding their election for officers, or shall refuse to open the same to the inspection of any of the stockholders at the time of holding the elections, such treasurer or secretary as the case may be, shall for every such neglect or refusal, forfeit and pay the sum of one hundred dollars, to be recovered at the suit of any stockholder or stockholders, in like manner as sums of the same amount are by law recoverable within this commonwealth, and every election held after the first day of August next, where the stock books of the company holding such election shall not be produced and opened to the inspection of the stockholders in manner aforesaid, shall be deemed null and void."

The following Act "to prevent obstructions being placed on turnpike roads," was passed on the 21st of March, 1833.

"Section 1. From and after the first day of September next, any turnpike company who shall permit large and unbroken stones, or heaps of stones which may endanger the passage of any wagon, stage or other carriage, to remain on the paved or artificial parts of their respective roads for a period exceeding twenty-four hours after information's being given that such obstructions do exist, shall be liable to pay a fine not exceeding forty dollars nor less than ten dollars, for every such offence, to be recovered on conviction thereof before any justice of the peace of the proper county, as debts of like amount are by law recoverable, with costs of suit, the one half to the use of the prosecutor, and the other half to and for the repair of the roads within the township where such obstructions are found.

"Section 2. Information given to, and the service of any summons upon one of the gate-keepers or toll-gatherers of any turnpike company next to where such obstructions may be found, shall be as good and valid in law as if given to or served upon the president or other principal officer, or the treasurer, secretary or chief clerk of any turnpike company as aforesaid.

"Section 3. No carter or teamster shall leave his wagon or team stand, during the night, within less than ten feet* of the centre of the turnpike road, under a penalty of five dollars for each and every such offence, to be recovered on conviction thereof

* Did not the Legislature mean *within ten feet?*

before any justice of the peace of the proper county, with costs of suit, the one half for the use of the prosecutor, and the other half to and for the repair of the roads of the township where such offence may be committed."

The following decisions have been made respecting railroads made by incorporated companies.

There is no certain rule by which the injury done to a man's property by the construction of a railroad through it, is to be measured; it must be referred to a jury as a matter of fact under all the circumstances; and the jury cannot legitimately inquire whether the plaintiff owned property at another place, separate from and unconnected with the property alleged to be injured, which was enhanced in value by the road.[8]

An Act of Assembly having authorized a railroad company to "locate and construct" a railroad, and declared that the "location should be approved by the judges of the Court of Quarter Sessions upon the view of six persons to be appointed by said court as directed," it was held that it was not a valid exception to the proceedings that the location was made by the jury, nor that there were not two full terms between the appointment of the jury and the confirmation of the report.[9]

The contractors for making the Reading Railroad were authorized, under the 12th section of the Act of incorporation, to enter and occupy with temporary dwellings, stables, blacksmiths' shops, &c., the lands adjoining the line of the road, provided they took no

[8] Philadelphia & Reading Railroad Company *v.* Gibson, 8 Watts 243.

[9] Philadelphia & Trenton Railroad, 6 Wharton 25.

more than was necessary for such purpose, while engaged in the performance of their contract.[10]

Section 8 of the "*Act authorizing John Prall to sell* and convey certain real estate in Bucks county," passed March 21, 1842, provides, "that hereafter, when any action is commenced by any person or persons or bodies corporate, against an incorporated railroad or canal company, in any county in which the corporate property of such company is wholly or in part situated, it shall be lawful, if the president, treasurer, secretary or chief clerk of such corporation does not reside, or cannot be found in such county, for the sheriff or other officer to whom such process is directed, to serve the same on any manager or director of such company being in such county, and the service so made shall be deemed sufficient, and in case no director or manager can be found in the county, it shall be lawful for such officer to go into an adjoining county to serve the process as hereinbefore stated."

Section 11 of the "*Act to incorporate the Liberty Fire Company of Holmesburg, in the County of Philadelphia*," passed July 26, 1842, enacts "that whenever any railroad or canal company has borrowed money and given to the lender thereof, a bond or other evidence of indebtedness in a larger sum than the amount actually received, such transactions shall not be deemed usurious or in violation of any law of this commonwealth prohibiting the taking of more than six per cent. interest."

"An Act relative to the obstructing of the crossings of public roads by locomotives and cars," passed on

[10] Lauderbonn v. Duffy, 2 Barr 398.

the 20th of March, 1845, enacts "that it shall not be lawful for any railroad company to block up the passage of any crossings of public streets or roads, or obstruct the said crossings with their locomotives or cars; and if any engineer or other agent of any such railroad company shall obstruct or block up such crossings, he or they shall be subject to a penalty of twenty-five dollars, to be recovered with costs in the name of the Commonwealth of Pennsylvania, before a justice of the peace; one half of such penalty shall be paid to the informer or informers, and the remaining half shall be paid into the treasury of the commonwealth: *provided*, that in the event of the said engineer or agent's being unable to pay the said penalty, then and in that case, the said railroad company employing the said engineer or agent, shall pay the penalty aforesaid."

## CHAPTER X.

### OF LATERAL RAILROADS TO THE PUBLIC WORKS.

On the 5th of May, 1832, the following Act "regulating lateral railroads," was passed:

"Section 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* that if any owner or owners of land, mills, quarries, coal mines, lime-kilns or other real estate in the vicinity of any railroad, canal or slackwater navigation, made or to be made by any company, or by the State of Pennsylvania, and not more than three miles distant therefrom, shall desire to make a railroad thereto over any intervening lands, he or they, their engineers, agents and artists, may enter upon any lands, and survey and make such route as he or they shall think proper to adopt, doing no damage to the property explored, and thereupon may present a petition to the Court of Common Pleas of the county in which such intervening land is situated, setting forth his or their desire to be allowed to construct and finish a railroad in and upon the said route, and the beginning, courses and distances thereof, and place of intersection of the main railroad, canal or slackwater navigation, which shall be filed and entered of record in the said court, whereupon the said court shall ap-

point six disinterested and judicious men, resident in the said county, who shall view the said marked and proposed route for a railroad, and examine the same, and if they or any four of them shall deem the same necessary and useful for public or private purposes, they shall report in writing at the subsequent term of said court, what damages will be sustained by the owner or owners of the said intervening land, by the opening, constructing, completing and using the said railroad, and the report of the said viewers and appraisers shall be filed of record in the said court, and if not appealed from, be liable to be confirmed or rejected by the said court, as to right and justice shall appertain; and if either of the parties shall be dissatisfied with said report, he or they may appeal therefrom to the said Court of Common Pleas, within twenty days after such report has been filed in the prothonotary's office and not after; and after such appeal, either party may put the cause at issue in the form approved of by the court, and the said issue shall be placed first on the trial list of the next regular term of the said court, and be there tried and determined by the court and jury, and the verdict so rendered and judgment thereon shall be final and conclusive, without further appeal or writ of error, and it shall be the duty of the said viewers and jury to take into consideration the advantages which may be derived by the owner or owners of land passed by the said road, when making up their report, or forming their verdict thereon.

"Section 2. *And be it further enacted by the authority aforesaid*, that the said court shall tax and allow such fees to the viewers and appraisers, and officers of the court, as are chargeable for such

services in the existing fee bills, which shall be paid by the petitioner for the said railroad, and, if necessary, their payment shall be compelled by attachment, and it shall be at the option of the petitioner or petitioners for the said railroad, either after the report filed, or after the verdict of the jury, after paying the legal costs to be taxed as aforesaid, to abandon the further prosecution of the said railroad, and as evidence thereof [he or they] shall file his or their declaration of that intent in writing, in the said court, which shall terminate all further proceedings on the said petition.

"Section 3. *And be it further enacted by the authority aforesaid,* that the said railroad shall not exceed in breadth twenty feet, nor pass through any burying ground or place of public worship, nor any dwelling house or out-buildings, without the consent of the owner thereof; and it shall be of single or double track, and formed of wood, stone and iron, each or all of them, as the proprietors of the said road shall adopt; the streams of water over which it may pass, shall be bridged with stone or wood, and the right of property in the said railroad shall be vested in him or them, his or their heirs and assigns, who shall have subscribed the said petition for the said railroad, and whose funds shall have been contributed and paid for the construction thereof, in such just proportions as each contribution and payment shall bear to the whole amount expended in the formation and completion of the said railroad, and the satisfaction of damages for lands and materials appropriated thereto; and the said railroad shall be jointly and severally enjoyed and used by the proprietors thereof: the proprietors of the said railroad,

their workmen and agents shall not break ground or commence the construction of the said railroad, until the damages reported by the viewers, or awarded by the verdict of the jury, shall be tendered or paid to the party or parties entitled thereto, except in cases of their being unknown to the petitioners.

"Section 4. *And be it further enacted by the authority aforesaid,* that fifteen days' notice shall be given of the intention to file a petition for a railroad in the Court of Common Pleas, and of the time of viewing the premises by the viewers, to the owner or owners of the lands over which the route of the contemplated railroad shall pass, if the said owners shall be resident in this commonwealth; and if in any case the owner or owners of said lands shall be unknown, an affidavit thereof being filed by any petitioner for said road, notice shall be given in one public newspaper, printed in the county where the land lies, for three successive weeks; and if there is no newspaper printed in the county where the land lies, then publication in any newspaper printed in the adjoining county shall be sufficient.

"Section 5. *And be it further enacted by the authority aforesaid,* that he or they who shall construct the said railroad, after having paid the damages ascertained as aforesaid, shall be entitled to use and apply all the said gravel, timber and other materials on the route adopted, and within the breadth of twenty feet, to and for the formation and completion of the said road and bridges, and it shall be lawful for the petitioners for and the proprietors of the said railroad, his or their heirs and assigns and their agents and persons employed by or under him or them, to enter upon any land near or adjoining said railroad

to search for stone, gravel, sand, wood or other materials to be used in the construction of the said road; but no stone, gravel, sand, wood or other materials shall be taken from any land for the purposes aforesaid, until the rate of compensation therefor shall be ascertained and settled with the owners of the said lands; but if the parties cannot agree thereon, each party shall choose a man, who, if they cannot agree, shall choose an umpire, all of whom shall, under oath or affirmation, fairly and impartially estimate the same, and such award shall be final and conclusive; but if the owner or owners of such land, out of which the said materials shall be designed to be taken, shall be a feme covert, non compos mentis, out of the state or unknown, the Court of Common Pleas of the proper county shall, in writing, appoint three impartial men, who, on oath or affirmation shall fairly and impartially estimate the same materials, the amount of which said valuation shall be paid or tendered to the owner or owners thereof, if within the state and known, before they are removed or applied to the construction of the said railroad.

"Section 6. *And be it further enacted by the authority aforesaid,* that the proprietor or proprietors of the said railroad, on the completion of the same, shall file in the Court of Common Pleas a full statement and account of all the expenses incurred in the formation and completion of the said road, under the oath or affirmation of some one or more who shall have had knowledge of the same, within three months after the same shall be completed and put in use, under the penalty of one hundred dollars, to the end that the said road and the privileges

appurtenant thereto may be resumed by the commonwealth, whenever the Legislature shall enact the payment to the proprietors of such railroad, their heirs and assigns, of the principal money expended in the construction of the same.

"Section 7. *And be it further enacted by the authority aforesaid*, that the said railroad shall and may be used by any person or persons transporting any thing thereon, in such cars, wagons and vehicles as are adapted to and used thereon by the proprietor or proprietors of the said railroad or their agents and no other, he or they using the same, paying four cents per mile on each and every ton weight of the article transported thereon, and on all single articles weighing less than a ton, it shall be lawful to charge and receive an advance not exceeding twenty per cent. on the rate as above established.

"Section 8. *And be it further enacted by the authority aforesaid*, that the said railroad shall be so constructed as not to obstruct or impede the free use and passage of any public roads which may cross or enter the same, being now laid out or hereafter to be laid out, and in all places where the said railroad may cross or in any manner interfere with any public road, the proprietors of the said railroad shall make or cause to be made a good and sufficient bridge or bridges, causeway or causeways, to enable all persons passing or travelling such public road to cross and pass over said railroad, and if the proprietor or proprietors of said railroad shall refuse or neglect to make such bridge or bridges, causeway or causeways, or when made to keep the same in good repair, they shall be liable to pay a penalty of ten dollars for every day the same shall be so neglected or refused

to be made or repaired, to be recovered by the supervisor of the township, with costs for the use of the township, as debts of like amount are by law recoverable, and the service of process on any one of the proprietors of the said railroad shall be as good and effectual as if made on all of them.

"Section 9. *And be it further enacted by the authority aforesaid,* that for the accommodation of all persons owning or possessing land through which the said railroad may pass, and to prevent inconvenience to such persons in crossing or passing over the same, it shall be the duty of the proprietors of the said railroad, if required, to make or cause to be made a good and sufficient bridge or bridges, causeway or causeways, whenever the same may be necessary to enable the occupant or occupants of said land to cross or pass over the same with wagons, carts and implements of husbandry, as occasion may require: *provided,* that the proprieters of the said railroad shall in no case be required to make or cause to be made, more than two such causeways through each plantation or lot of land, for the accommodation of any one person owning or possessing land through which the said railroad shall pass; and where any public road shall cross the said railroad, the person owning or possessing land through which the said railroad shall pass, shall not be entitled to make such requisition on the proprietors of the said railroad; and the said bridge or bridges, causeway or causeways, when so made, shall be maintained and kept in repair by the proprietor or proprietors of the said railroad, and if they shall refuse or neglect to make such bridge or bridges, causeway or causeways, or when made to keep the same in good repair, the said proprietors shall

be liable to pay any person aggrieved thereby, all damages sustained by such person or persons in consequence of such neglect or refusal, to be sued for and recovered before any magistrate or court having cognizance thereof, and the service of process on any one of the proprietors of the said railroad shall be as good and effectual as if made on all of them.

"Section 10. *And be it further enacted by the authority aforesaid*, that no suit or action shall be brought or prosecuted by any person or persons for any penalties incurred under this Act, unless such suit or action shall be commenced within twelve months after the offence committed or the cause of action shall have accrued; and the defendant or defendants in such suit or action may plead the general issue, and give this Act and the special matter in evidence, and that the same was done in pursuance and by authority of this Act.

"Section 11. *And be it further enacted by the authority aforesaid*, that if any person or persons shall wilfully and knowingly break, injure or destroy the said railroad or any part thereof, or any work or device or any part thereof to be erected by the proprietors of the said railroad, or shall wilfully place any obstruction in and upon the said railroad, he or they so offending shall forfeit and pay to the proprietor or proprietors of the said railroad, three times the actual damages so sustained, to be sued for and recovered with costs of suit before any justice of the peace or court having cognizance thereof, by action of debt, in the name and for the use of the proprietor or proprietors of the said railroad.

"Section 12. *And be it further enacted by the authority aforesaid*, that the provisions of this Act

shall extend to the Counties of Lycoming, Luzerne, Schuylkill and Northumberland only: *provided*, that if any lateral railroad so constructed as aforesaid shall be disused or suffered to remain out of repair for the space of two years, all right of way or other privilege therein shall cease and revert to the original owners of the land, their heirs and assigns.

"Section 13. *And be it further enacted by the authority aforesaid*, that the Legislature reserve the right to repeal or alter this Act either in whole or in part, as may respect any railroad constructed under the provisions of this Act."

It has been decided that this Act is not unconstitutional.[1]

In proceedings to open a railroad from mines to the public works, a petition signed by the lessee and agent of the owners of the mines on their behalf, is sufficient.[2]

A notice of the filing of the petition, signed by an attorney, is sufficient.[3]

A notice of the order of the court stating it in substance, is sufficient.[4]

The Act does not contemplate that the petitioner for a road to the public works should own land at the point of construction; he may use his road there conjointly with the interests of the owners of the land.[5]

The necessity for such a railroad, within the Act of Assembly, is not an absolute but a reasonable necessity, and may exist though a road might at great expense be constructed over the petitioner's land.

[1] Harvey *v.* Thomas, 10 Watts 63; Harvey *v.* Lloyd, 3 Barr 331.

[2] [3] [4] Harvey *v.* Lloyd, 3 Barr 331.

[5] Harvey *v.* Thomas, 10 Watts 63.

Whether necessary and useful, is a question of fact for the jury. It may commence at a point on and extending over the twenty feet occupied by the railroad of another, he not objecting, and terminate within one hundred feet of that road on the same public canal.[6]

Evidence of the enhancement of the value of the petitioner's land by the proposed road, is inadmissible in proceedings under this Act.[7]

A. being the owner of a coal mine, proceeded under this Act to ascertain the amount of damage which B. would sustain by the location of a railroad across his land, and a verdict was rendered in favour of B. for the amount of damage. A. then entered upon B.'s land and made the road before a judgment was entered on the verdict. *It was held,* that though the proceedings thus had by A. did not furnish a justification of the trespass, yet they protected him from vindictive damages.[8]

[6] [7] Harvey *v.* Lloyd, 3 Barr 331.

[8] Harvey *v.* Thomas, 10 Watts 63.

## CHAPTER XI.

### OF THE LAW OF THE ROAD.

Usage in Pennsylvania has settled that travellers meeting on a road are bound to take, respectively, the right of the road. In England a contrary usage prevails, and it has often been desired that the English practice, as the most reasonable, should be here adopted, for so long as drivers sit to the right of their vehicles, which side allows them the freest use of their whips, so long will it be more convenient for meeting vehicles to pass on each other's right hand, as the danger of collision between them is thereby lessened.*

In the Cumberland road, travellers meeting are required to pass each other on the left. (See *postea*).

It is usual in the charters of bridge companies to introduce a provision requiring persons passing them to "keep to the right."

The following points have been decided as to the duty of travellers in cases where one overtakes another travelling in the same direction.

A traveller may use the middle or either side of a

* The following lines refer to the English usage:

"The law of the road is a paradox quite,
On the *right* you are *wrong*, on the *left* you are *right*."

public road at his pleasure, and is not bound to turn aside for another travelling in the same direction, provided there be convenient room to pass on the one hand or the other.[1]

If there be not convenient room to pass, it is, doubtless, the duty of the other to afford it on request made, by yielding to the hindmost traveller an equal share of the road, if that be adequate and practicable; if not, it must be deferred until the parties arrive at ground more favourable to its accomplishment. Should the leading traveller refuse to comply, he would be answerable for it in due course of law. But the other has no right to force a passage by a forcible collision.[2]

Evidence of a custom for the leading carriage to incline to the right, the other passing at the same time to the left, *was held* not to control the general law in such a case.[3]

[1] [2] [3] Bolton *v.* Colder, 1 Watts 360.

## CHAPTER XII.

### OF FERRIES.

No custom exists to ground a right to land or receive freights, or establish ferries on another person's freehold, without his consent.[1]

The right to navigate a public river transversely or otherwise, is susceptible of exclusive appropriation only by grant from the public to whom it belongs; and consequently we have no ferries by prescriptive right or presumptive grant of exclusive navigation from length of time. But the owners of the shores have the power to control the subservient and indispensable right of embarkation and landing, even at the terminus of a public road.[2]

The grant of a privilege of landing and embarking ferry boats upon the land of another, may be presumed from the use of it for a long time. And the ordinary and occasional use of it would be such an occupation of the privilege as would be noted to a purchaser of the land out of which the privilege was granted.[3]

The grant of a privilege to land and embark ferry boats upon the land of another held by a Connecticut title, is not effected by a grant of title from Pennsylvania, which did not extinguish but confirmed the Connecticut title.[4]

[1] Chambers *v.* Furry, 1 Yeates 167; Cooper *v.* Smith, 9 S. & R. 32.
[2] [3] [4] Bird *v.* Smith, 8 Watts 434.

## CHAPTER XIII.

### CONCLUSION.

The following Acts of Assembly and Resolution adopted by the Assembly, could not be conveniently arranged under any of the foregoing heads.

"An Act to declare the uses of certain bonds," passed April 13, 1827:

"Section 1. Bonds or obligations given for the due execution of his or their respective offices or employments, by commissioners, trustees or others appointed by virtue of laws of this commonwealth, for the opening, constructing or erecting of any roads or bridges, and for the receipt and disbursement of moneys and taxes for the making, constructing or erecting of the same, in all cases where townships or counties are or may be interested in the faithful performance of the covenants mentioned or contained in the provisions thereof, the said bonds or obligations shall be deemed and taken, as the case may be, for the use of and in trust for the commissioners of the county aggrieved, or for the use of and in trust for the supervisors of the roads and highways of the township or townships aggrieved by the misfeasance or nonfeasance of the persons who have given or may give the same.

"Section 2. When any of the said bonds shall be put in suit, and judgment thereon obtained, the judgment shall remain in the same nature the said bonds

or obligations were, and no execution shall issue thereupon, before the said county, township or townships or party grieved shall, by writ of *scire facias*, summon the person or persons against whom the said judgment is obtained, to appear and show cause why execution shall not issue upon the said judgment; and if the county, township or townships or party grieved shall prove what damages the said county, township or townships or the party aggrieved has sustained, and thereupon a verdict be found for the said county, township or townships or party grieved, the Court of Common Pleas where such suit is, shall award execution for so much as the jury shall then find, with costs and no more, and the former judgment is hereby declared still to remain cautionary for the satisfaction of such others as shall legally prove themselves damnified, and recover their damages in manner aforesaid.

"Section 3. No person shall be excluded from being a witness or juror, in the trial of any case under this Act, by reason of his being an inhabitant of any county which may be interested in such suit, or by reason of his being liable to the payment of any county, township or other taxes."

The following Resolution was adopted April 2, 1831:

"Where any public road or highway in this commonwealth shall be injured or destroyed by the construction of any canal, railroad, feeder or dam belonging to the state, either by the actual occupation of said roads or highways, or by damming the water on the same, the superintendent of the line of canal, railroad, feeder or dam, upon which such injury has been sustained, shall, under the direction of the canal

commissioners, put the said roads and highways in as good order and repair as they were in before the making of such canals, railroads, feeders or dams."

The following are the concluding sections of the Act of June 13, 1836:

"Section 81. Nothing in this Act shall be deemed or taken to repeal any special or local Act now in force relating to roads in any of the counties of this commonwealth, except such local Acts relating to the City and County of Philadelphia, as are inconsistent with the provisions of this Act.

"Section 82. All laws hereby altered or supplied, so far as they are inconsistent with this Act, are hereby repealed, and this Act shall take effect from and after the first day of September next."

Coaches carrying the mail of the United States are protected by the Act of Congress from being wilfully and wantonly obstructed or delayed, but they are on a footing with all other carriages in every other respect.[1]

A public road upon lots of ground which the owner had covenanted to sell and convey, is not such an incumbrance as will entitle the vendee to defalk from the amount of the purchase money, in an action of covenant for the price upon the agreement of sale.[2]

[1] Bolton *v.* Colder, 1 Watts 363, per Gibson C. J.

[2] Patterson *v.* Arthurs, 9 Watts 152.

# APPENDIX.

## ACTS OF ASSEMBLY RELATING TO THE CUMBERLAND ROAD.

"An Act for the preservation and repair of the Cumberland Road, (passed April 4, 1831).

"Whereas, that part of the Cumberland road lying within the State of Pennsylvania, is in many parts in bad condition for want of repairs, and as doubts have been entertained whether the United States have authority to erect toll gates on said road and collect toll; and as a large portion of the people of this commonwealth are interested in said road and its constant continuance and preservation:

"Therefore,

"Section 1. As soon as the consent of the government of the United States shall have been obtained, as hereinafter provided, William F. Coplan, David Downer, of Fayette county, Stephen Hill, Benjamin Anderson, of Washington county, and Thomas Endsley of Smithfield, Somerset county, shall be and they are hereby appointed commissioners, a majority of whom shall be sufficient to transact business, who shall hold their offices for three years after the passage of this Act, after which the right of appointing said commissioners shall rest in the governor of this commonwealth, to build toll houses and erect toll gates at suitable distances, on so much of the Cumberland road as lies within the State of Pennsylvania: *provided*, that if any one or more of the said commissioners should die, resign or refuse to serve, the governor shall appoint one or more other commissioners to fill the vacancies so happening: *and provided also*, that nothing herein contained shall be construed to prevent the governor from re-appointing the commissioners named in this Act, if he thinks proper. [The number of commissioners has been reduced to one by

the Act of March 28, 1840, *postea*, and changed to two by Act of March 16, 1847, *postea*].

"Section 2. For the purpose of keeping so much of the said road in repair as lies within the State of Pennsylvania and paying the expenses of collection and other incidental expenses, the commissioners shall cause to be erected on so much of the said road as passes within this state, at least six gates; and that as soon as said gates and toll houses shall be erected, it shall be the duty of the toll collectors, and they are hereby required to demand and receive for passing the said gates the tolls hereafter mentioned; and they may stop any person riding, leading or driving any horses, cattle, sulky, chair, phaeton, cart, chaise, wagon, sleigh, sled or other carriage of burden or pleasure, from passing through the said gates until they shall respectively have paid for passing the same, that is to say, for every space of fourteen miles in length on said road, the following sums of money, and so in proportion for every greater or lesser distance; the rates of toll to be collected at each gate shall be the following, to wit, for every score of sheep or hogs, six cents; for every score of cattle, twelve cents; for every led or drove horse, three cents; for every horse and rider, four cents; for every sleigh or sled, for each horse or pair of oxen drawing the same, three cents; for every dearborn, sulky, chair or chaise with one horse, six cents; for every chariot, coach, coachee, stage, wagon, phaeton, chaise with two horses and four wheels, twelve cents; for either of the carriages last mentioned with four horses, eighteen cents; for every other carriage of pleasure, under whatever name it may go, the like sum according to the number of wheels and horses drawing the same; for every cart or wagon whose wheels shall exceed two and a-half inches in breadth and not exceeding four inches, four cents for every horse or pair of oxen drawing the same; and every other cart or wagon whose wheels shall exceed four inches and not exceeding five inches in breadth, three cents for every horse or pair of oxen drawing the same; and for every other cart or wagon whose wheels shall exceed six inches and not more than eight inches, two cents for every horse or pair of oxen drawing the same; all other carts or wagons whose wheels shall exceed eight inches in breadth, shall pass the said gates free of toll: *provided*, that the commissioners

appointed by the 1st section of this Act, may commute the rates of toll with any person or persons, by taking of him or them a certain sum annually in lieu of the tolls aforesaid: *and provided also*, that nothing in this Act shall be construed so as to authorize any tolls to be received or collected from any person or persons passing or repassing from one part of his farm to another, or to or from a mill, or to or from any place of public worship, funeral, militia training, elections, or from any student or child going to or from any school or seminary of learning; or from persons and witnesses going to and returning from courts: *and provided further*, that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States or to any of the States comprising this Union.*

"Section 3. The said commissioners shall appoint proper and suitable persons as toll-gatherers, who shall settle their accounts quarterly with the commissioners, and at all other times when thereunto required, and shall, at all times, pay over to them on demand, the amount of tolls by them collected; and it shall be the duty of the said commissioners to render annually to the Court of Quarter Sessions of the respective counties through which the road passes, an account of the tolls received and expenses incurred on said road, on oath or affirmation, and publish the same in one or more newspapers in each county through which the road passes; and they shall each receive a compensation of two dollars per day for every day that they shall be engaged on the business of said road: *provided*, that the annual compensation to any one commissioner shall not exceed the sum of one hundred dollars. [Compensation altered by section 6 of the Act of March 28, 1840, *postea*].

"Section 4. The amount of tolls, after deducting therefrom the expenses and charges of collection and compensation of commissioners, shall be applied, under the direction of the commissioners, to the repairs and preservation of said road, in such manner, and under such regulations, as they from time to time prescribe, and to no other purposes whatever; and the said commissioners shall have power to increase or diminish the rates of toll: *provided*,

* The tolls have been increased by Act of April 14, 1845, *postea*.

that the same shall, at no time, be increased beyond the rates of toll established by an Act entitled "an Act authorizing the governor to incorporate a company for making an artificial road from the bank of the river Susquehanna opposite the borough of Harrisburgh to Pittsburgh," passed the twenty-fourth day of February, one thousand eight hundred and six.

"Section 5. Directors shall be set up at proper and convenient situations, to caution all conductors or drivers of carriages, on the road aforesaid, that they shall, at all times, pass on the left of each other, under the penalty of two dollars for every offence.

"Section 6. If any of the toll-gatherers shall unreasonably delay or hinder any passenger or traveller at any of the gates, or shall demand or receive more toll than may be established under this Act, he shall, for each and every offence, forfeit and pay to the party so aggrieved, the sum of twenty dollars.

"Section 7. If any person or persons shall wilfully and of purpose, throw down or otherwise injure any of the walls, bridges, culverts or other works on said road, or shall otherwise wilfully injure or obstruct the passage of the said road unnecessarily, the person or persons so offending shall forfeit and pay, for every such offence, any sum not less than five nor more than fifty dollars, to be collected and applied as is directed in the 9th section of this Act.

"Section 8. The toll-gatherers on said road shall respectively receive compensation for their services, at the rate of twelve per cent. on the amount of tolls by them respectively collected: *provided*, that the annual compensation of any toll-gatherer shall never exceed the sum of two hundred dollars.

"Section 9. The penalties and forfeitures which may be incurred under this Act, shall and may be sued for and recovered in the name of the commissioners of the road, without naming them as individuals, or of any person prosecuting the same; the one moiety thereof to the use of the commonwealth, the other to the person so prosecuting for the same, before any magistrate or court having jurisdiction in like cases.

"Section 10. This Act shall not have any force or effect until the Congress of the United States shall assent to

the same, and until so much of the said road as passes through the State of Pennsylvania be first put in a good state of repair, and an appropriation made by Congress for erecting toll houses and toll gates thereon, to be expended under the authority of the commissioners appointed by this Act: *provided*, the Legislature of this state may, at any future session thereof, change, alter or amend this Act, provided that the same shall not be so altered or amended as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of said road, for the payment of the fees or salaries of the commissioners, the collectors of tolls and other agents: *and provided further*, that no change, alteration or amendment shall ever be adopted that will in any wise defeat or affect the true intent and meaning of this Act.

"A Supplement to an Act for the preservation and repair of the Cumberland Road, (passed April 1, 1835).

"Section 1. It shall be the duty of the supervisors of highways of the townships in the Counties of Somerset, Washington and Fayette, through which the Cumberland road passes, to make or cause to be made a paved valley or stone culvert, where any state, county or township roads shall intersect the said Cumberland road, so as to admit the free passage of water along the side of the same.

"Section 2. If any person shall drive a wagon, coach or other carriage, either fast or rough locked, or shall drag any log or piece of timber upon said road, except farmers hauling logs for the use of their farms, and when it shall be covered with ice, or shall stand any wagon, coach or other carriage over night or for the purpose of feeding, or shall in any manner purposely obstruct the travelling upon the same, he shall forfeit and pay a sum not exceeding five dollars, to be recovered and applied as is directed by the 9th section of the Act to which this is a supplement.

"Section 3. The surrender by the United States of so much of the Cumberland road as lies within the State of Pennsylvania, is hereby accepted by this state; and the commissioners to be appointed under this Act are authorized to erect toll gates on the whole or any part of said road, at such times as they may deem it expedient and proper to do so.

"Section 4. The toll-gatherers shall keep an accurate account of all moneys received by them, and when required by the commissioners, shall make out a statement of the same under oath or affirmation.

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Section 5 of an Act passed April 4, 1837, "appropriating the state dividends of stock in the Youngmanstown and Bellefonte Turnpike Road," &c., provides that "from and after the passage of this Act, all persons engaged in the transportation of fuel for home consumption on that part of the Cumberland road which passes through Pennsylvania, shall be exempt from the payment of toll, any thing in the act for the preservation and repair of the Cumberland road to the contrary notwithstanding."

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"Resolution relative to the appointment of commissioners on the Cumberland road, (passed February 5, 1839).

"Resolved by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, that each of the commissioners within the limits of Pennsylvania on the Cumberland road, who now are or shall hereafter be appointed, before entering upon the performance of his duties, shall give a bond to the commonwealth in the penal sum of six thousand dollars, with security to be approved of by one of the judges of the Court of Common Pleas of Somerset, Fayette or Washington counties, conditioned for the faithful performance of their respective duties, and also, that so much of the law as is altered or supplied, be and the same is hereby repealed."

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The following sections are from "an Act authorizing a review of part of the Emlinton and Centreville State Road and for other purposes," (passed March 28, 1840).

"Section 4. That from and after the first Monday of November next, the repairs of that portion of the Cumberland road which passes through Pennsylvania, shall be under the superintendence and direction of one commissioner, who shall be appointed by the governor and shall hold his office for the term of three years, unless sooner superseded, and shall receive for his services three dollars per day for each and every day necessarily engaged in the performance of his duties.

"Section 5. That the commissioner so appointed shall, previous to his entering upon the duties of his office, give bond to the commonwealth for the faithful performance of the duties of his office in the penal sum of ten thousand dollars, with surety to be approved by the Court of Common Pleas of the County of Fayette or Washington.

"Section 6. That the said commissioners shall, annually, render to the Courts of Common Pleas of the Counties of Fayette and Washington, an account of all the receipts and expenditures on the said road, specifying the receipts and expenditures of each county, and said court shall appoint auditors to settle and adjust the amount [*qu.* account?] so rendered by said commissioners, and the amount [account?] when so settled and adjusted by said auditors, shall be published in at least one newspaper in each of the Counties of Fayette and Washington.

"Section 7. That in case the said commissioner shall be dissatisfied with the adjustment of his account by the auditors, so as aforesaid appointed, he may appeal to the said court, and they shall direct an issue to try the same, if required."

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A section of an Act passed on the 5th of April, 1843, increased the tolls on the Cumberland road. It has been supplied by the Act next hereafter mentioned, the preamble of which refers to it.

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The following sections are from an Act passed April 14, 1845, "authorizing the laying out of a state road from the Greensburgh Turnpike," &c.

"Section 11. That whereas, it has lately been decided by the Supreme Court of the United States, that the Acts of Assembly of this commonwealth, relating to the collection of tolls on that part of the Cumberland road which is within this state, passed June the thirteenth, eighteen hundred and thirty-six, and April fifth, eighteen hundred and forty-three, do not authorize the collection of any amount of tolls whatever for the passage upon said road of any stage, coach and other vehicle carrying passengers with their baggage and goods, if such stage, coach or other vehicle is at the same time carrying any of the mails or property of the United States. *And whereas*, the said court sanctions the power of Pennsylvania to provide for

the repairs of said road by a general assessment of tolls upon persons travelling thereon, which it is deemed just and right should be paid: *And whereas also*, it is found to be impracticable to keep said road in good repair and out of debt by the the tolls collectable under the existing laws of this commonwealth, as interpreted by said court; therefore,

"Section 12. In addition to the tolls, which by the operative laws heretofore enacted, are authorized to be demanded and received at the gates erected upon the Cumberland road within Pennsylvania, there shall be paid, on and after the first day of May next, at each of said toll gates, by each and every person riding or travelling in or upon any dearborn, sulky, chair, chariot, coach, coachee, stage, wagon, phaeton, chaise or other carriage of pleasure or travel, including stages, coaches or other vehicles carrying United States mails, which shall pass or run upon said road and through or to any toll gate thereon lawfully erected, a tax or toll of not less than two nor more than fifteen cents, as shall be fixed and determined from time to time, by the commissioner of said road, for every fourteen miles upon said road in which such person shall have been a passenger or traveller, belonging to any such carriage, and in proportion for shorter distances: *provided*, that no toll under this Act shall be demanded for any driver of any coach, stage or other public vehicle, nor from any person bona fide employed as a guard to the mails or other public property in any such carriage, nor from any duly employed agent of the general post-office department, nor from any bearer of despatches to or from the government of the United States or this state, nor from any naval or military officer of the United States or of this state who shall be at the time travelling in discharge of the duties of his office; but all such persons, upon exhibiting satisfactory evidence of the character in which they are travelling, shall pass free from the toll imposed by this Act: *provided also*, that no toll under this Act shall be demanded and received from any of the persons exempt from toll by the laws of this commonwealth, relating to said road, heretofore enacted: *and provided further*, that nothing herein shall be construed so as to prevent changes of the present rates of tolls upon the vehicles, as authorized by the law heretofore enacted relating to said road; such changes, as well as those

which may be made under this Act, to be uniform on each particular species or mode of travel or riding, and to be regulated according to the wants of the road.

"Section 13. That should any passenger or traveller, liable to the payment of toll by this Act, neglect or refuse to pay the same at any gate, then it shall and may be lawful to collect the same, with costs, as debts of like amounts are collectable by suit, in the name of the commissioner of said road, against any person or his or her parent, husband, master or guardian, or against the owner or owners, or bailee or bailees of the carriage in which such person shall be, or shall have been a passenger or traveller, and in no suit for tolls under this Act, or under former Acts relating to the same road, shall any plea in abatement for non-joinder of any person or persons, jointly liable with the person or persons sued, be allowed or sustained: *provided*, that nothing herein contained, shall be construed to prohibit any receiver or collector of tolls on said road, or other agent of the commissioner, from stopping and detaining any carriage for the non-payment of toll, by any person or persons riding or travelling therein and liable therefor; but the right of any such agent so to do is hereby given, in addition to the other remedies by this Act provided.

"Section 14. That it shall be the duty of every driver, or person in charge of any carriage of pleasure or travel upon said road, under penalty of fifty dollars for every wilful neglect or refusal, to be collected by suit as hereinbefore directed, for the use of the road, faithfully to report at every gate through which such carriage may pass, the number of persons or passengers properly belonging to such carriage, who are liable to the payment of the tolls imposed by this Act, in such way as to inform the collector of tolls how much toll should be paid by all of the persons or passengers.

"Section 15. That if by reason of the neglect or refusal of passengers or travellers to pay, of drivers or conductors faithfully to report as hereinbefore directed, or from any other cause, any tolls by this Act authorized, be not paid as hereinbefore required, it shall and may be lawful for the collector of tolls at the gates on said road, to charge in a book the unpaid tolls to either the passenger or passengers, or any of the other persons specified in the foregoing sec-

tion of this Act, which account, when duly proved as other book accounts are allowed to be by law, shall be competent evidence in any suit for such unpaid tolls; and the amount thereof liable to be paid by any one person, or by any two or more persons jointly, may be sued for at the expiration of any period of time, not longer than one year, during which such tolls shall have been charged, and such suit or suits shall be in the name of the commissioners of the road, for the use thereof, and be exempt from abatement for non-joinder, as hereinbefore directed.

"Section 16. That if from any omission or neglect of drivers, or travellers or passengers, collectors, or any collector of tolls on said road, shall not be enabled to ascertain the number of passengers or persons properly belonging to any carriage who are liable to toll under this Act, he or they shall charge therefor, according to the number of passengers which such carriage shall be capable of carrying, and the tolls therefor shall be collected and recovered as hereinbefore directed: *provided*, that nothing in this Act shall prevent the commissioner of said road from accepting from the owner or owners, bailee or bailees of any carriage or line or number of carriages of pleasure or travel, a gross sum per month, per quarter or per year, so as thereby to exempt from tolls all persons riding or travelling in the carriages of such owner or owners, bailee or bailees, during the time for which such gross sum shall be paid or agreed to be paid, but the right of the commissioner so to do is hereby given, and all contracts made in pursuance of this provision shall be valid: *and provided also*, that the right of the commissioner of said road to sue for and recover unpaid tolls, under any of the provisions of this Act, shall not be impaired or defeated by any omission or defect in the book charges hereinbefore authorized, but the same may be recovered upon other adequate evidence in lieu of, or in addition to such book charges.

"Section 17. That every person who shall fraudulently evade or attempt to evade the payment of the toll imposed by this Act, shall for every offence forfeit and pay to the commissioner, for the use of said road, a penalty of not more than twenty dollars, to be recovered by action, as hereinbefore directed; and should the name or names of any person or persons liable for the toll or any penalty imposed by this Act, be unknown to the proper collector of

tolls or other agent of the commissioner, then a suit or suits therefor may be instituted in the manner directed by the 7th and 8th sections of the Act entitled 'an Act relating to the commencement of actions,' approved the thirteenth June, eighteen hundred and thirty-six."

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The following is the last section of "an Act declaring obstructions to private roads to be a public nuisance, and for other purposes," (passed March 16, 1847).

"Section 6. That from and after the expiration of the term of the present commissioner, section four of an Act entitled, 'an Act authorizing a review of part of Emlinton and Centreville state road, and for other purposes,' approved the twenty-eighth of March, eighteen hundred and forty, be and the same is hereby repealed; and the governor of this commonwealth is authorized and required to appoint two commissioners, one of whom shall have charge of that part of the Cumberland road lying east of the Monongahela river, and the other shall have charge of that part lying west of the Monongahela river; that each of said commissioners shall receive a yearly salary of three hundred and fifty dollars for his services, and shall perform the duties, and be subject to all responsibilities enjoined by the several Acts of Assembly relative to commissioners of the Cumberland road. That so much of the several Acts of Assembly relating to the Cumberland road, as is hereby altered, be and the same is hereby repealed."

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# ADDENDUM.

[From the Pennsylvania Law Journal for June, 1848].

On the 8th of April last, the Legislature enacted a law declaring that "all roads, the width of which have been heretofore fixed under a standing rule of the court, and opened accordingly, or ordered to be opened, are hereby confirmed, and made as valid and legal as if the width had been specially fixed by the court at the time of confirmation. Provided, that nothing herein contained shall be so construed as to affect the cases already adjudicated."

This Act restrains the operation of the decision of the Supreme Court *in re* Shefferstown road, 5th Barr 515.

f. 22

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